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IN THE

Supreme Court of the United States

October Term, 1975
No. [Undocketed] 75-926

PHILLIP ELWON WALTERS,

Appellant,

vs.

THE STATE OF CALIFORNIA,

Appellee.

APPELLANT'S JURISDICTIONAL STATEMENT ON APPEAL.

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PHILLIP ELWON WALTERS,

Appellant,

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THE STATE OF CALIFORNIA,

Appellee.

Appellant's Judisdictional Statement on Appeal [Pursuant to Rule 15 of the Rules of the United States Supreme Court].

To the United States Supreme Court, October Term, 1975:

Introductory Statement.

The Appellant, Phillip Elwon Walters, having previously filed timely notices of appeal, hereby files his *Jurisdictional Statement on Appeal* and requests that this case be placed on the docket of this Honorable Court. The Appellant seeks plenary review of the judgment and Order of the Supreme Court of California, dated September 4, 1975, denying a hearing after his conviction for kidnapping with bodily injury and

sentence of *life imprisonment without possibility of parole* were affirmed by the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

The Appellant is submitting this Jurisdictional Statement in order to demonstrate that this Court has jurisdiction of this Appeal and that a number of substantial Federal Constitutional questions are presented by this case which merit plenary review.

Opinions Below.

The Appellant was convicted of kidnapping with bodily injury in violation of California Penal Code §209 and sentenced to *life imprisonment without possibility of parole* by the Superior Court of San Bernardino County on April 16, 1974. The abstract of the Judgment of said Court is appended hereto [Ex. A]. On July 9, 1975, Appellant's conviction and sentence was affirmed by the Court of Appeal for the State of California, Fourth District, Division Two and the Opinion of said Court is appended hereto [Ex. B]. On July 31, 1975, Appellant's Petition for Rehearing was denied by the Court of Appeal [Ex. C]. A Petition for hearing was denied by the California Supreme Court on September 4, 1975 [Ex. D]. A Remittitur was filed in the Court of Appeal on September 9, 1975 [Ex. E].

Jurisdiction.

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2). Said statute authorizes the Supreme Court to review cases decided by the state courts, by way of Appeal, where (1) the validity

of a state statute is drawn into question on the ground that it is repugnant to the United States' Constitution and (2) the validity of the statute has been upheld by a Final Judgment of the Highest State Court [See Stern and Gressman, *Supreme Court Practice*, pp. 83-87].

Here, Appellant, in his Briefs submitted to the California Court of Appeal, expressly contended that California Penal Code §209, which provides that all persons convicted of kidnapping with bodily injury shall be committed to prison for *life without possibility of parole*, is repugnant to the Prohibition against Cruel and Unusual Punishments contained within the Eighth Amendment to the United States Constitution. However, the California Court of Appeal, in its Opinion, dated July 9, 1975, upheld the Constitutionality of this statute [Ex. B, pp. 24 *et seq.*]. Appellant then petitioned the California Supreme Court for a Hearing, again contending that California Penal Code §209 is repugnant to the United States Constitution. However, the California Supreme Court, in an order dated September 4, 1975, declined review of this issue and of the other issues raised on appeal [Ex. D].

On November 17, 1975, and November 26, 1975, Appellant took an Appeal to this Court by filing timely Notices of Appeal in the California Court of Appeal and the Superior Court of San Bernardino County [Exs. F and G respectively]. Appellant also attempted to file a notice of appeal in the California Supreme Court, but was informed by the Clerk of that Court that this was unnecessary [Ex. H]. The Attorney General was served with copies of all said Notices on November 14, 1975 [Ex. I].

On November 18, 1975, an Extension of Time within which to file this Jurisdictional Statement on Appeal was granted by Mr. Justice Rehnquist [Ex. J].

Therefore, it is concluded that this Court has jurisdiction pursuant to 28 U.S.C. §1257(2) and that this Appeal is timely and in conformity with the Rules of this Court.

Statutes Involved.

California Penal Code §209 declares, in relevant part, that:

> "Section 209 [Punishment of kidnapping for ransom, reward, etc.] Any person who . . . kidnaps . . . or . . . aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or be punished by imprisonment in the state prison *for life without possibility of parole,* at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnapping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm . . ." (Emphasis added).[1]

[1]In the instant case, it is noted that: the defendant could not be sentenced to death because of the time at which the alleged crime was committeed. The alleged kidnapping occurred after *Furman v. Georgia,* 408 U.S. 238, which declared unconstitutional the death penalty as currently applied, thus nullifying the death penalty provisions of Penal Code Section 209 and the recently passed Article I, Section 27 of the California Constitution. However, the crime was committed before the new death penalty was enacted for kidnapping offenses where "special circumstances" were involved. Thus, the only possible penalty which could have been imposed on defendant Walters, was life without possibility of parole.

Questions Presented.

1. Whether Appellant's conviction for kidnapping with bodily injury, based *solely* on the fact that he picked up a bag containing the ransom money, is so totally devoid of evidentiary support as to be violative of Due Process within the meaning of *Thompson v. Louisville,* 362 U.S. 199.

2. Whether, given the extremely weak nature of the evidence against Appellant, and the strong exculpatory evidence presented in his behalf, the Appellant was denied a fair trial and Due Process of law in view of the following factors:

(a) The District Attorney deliberately withheld crucial exculpatory evidence from the Grand Jury and chose to proceed by way of indictment solely for the purpose of preventing the Appellant from presenting evidence in his own behalf.

(b) The trial court, in clear violation of the meaning of *Sheppard v. Maxwell,* 384 U.S. 333, denied repeated motions for a Change of Venue despite the fact that this resulted in Appellant's being forced to stand trial in a county inundated with widespread hostility against him as a result of adverse publicity to which at least some of the jurors were admittedly exposed, and in a courtroom so permeated with hostility that the defendants had to be protected by bullet-proof glass from murderous assaults by members of the audience.

(c) The trial court denied Appellant's Motion to Sever Defendants for Trial, thus forcing Appellant to stand trial with co-defendants, whom the facts demonstrated, beyond a shadow of a doubt, were the direct

perpetrators of the kidnappings and the murderers of the kidnap victims, whereas Appellant's only alleged involvement, proved *solely* by the weakest kind of circumstantial evidence, was that he picked up the ransom money. Appellant thus suffered from prejudicial association with the co-defendants in the minds of the jurors.

(d) The Appellant was dragged before the jury in chains amidst a veritable army of armed guards, thus further prejudicing the jury.

(e) Armed guards were present at the counsel table during trial and repeatedly prevented Appellant from conferring in private with his attorney, thus denying him the effective assistance of counsel within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution.

(f) The trial judge informed the jury that they could form their opinion of the case after they had heard the prosecutor's opening argument, and before they had heard defense counsel's argument.

3. Whether California Penal Code §209, which provides that *all* persons found guilty of kidnapping with bodily injury shall be committed to life imprisonment *without possibility of parole,* regardless of the degree of the injury, the age or prior record of the offender, or the peripheral nature of the offender's involvement in either the seizure or carrying away of the victims, or the infliction of the bodily injury, is repugnant to the cruel and unusual punishment prohibition of the Eighth Amendment. Subsidiary questions presented are:

(a) Whether the imposition of the penalty of life imprisonment without possibility of parole is so psychologically degrading to human dignity as to be an inherently cruel and unusual punishment within the meaning of *Trop v. Dulles,* 356 U.S. 86 and *Furman v. Georgia,* 408 U.S. 238, Opinion of Brennan, *J.* at 270 *et seq.*

(b) Whether the imposition of this penalty on Appellant Walters, a forty-two year old man with no prior offenses of any kind, who was not involved in the seizure and carrying away of the victims, nor in the infliction of any injury upon them, and whose sole involvement, if any, was picking up the ransom money, is so disproportionate to his offense as to constitute a cruel and unusual punishment within the meaning of *Weems v. United States,* 217 U.S. 349.

Statement of the Case.

Appellant herein attempts to summarize those portions of the record of over 5,000 pages which are relevant to the issues presented in this Appeal.

A. Evidence.

The facts giving rise to the instant prosecution are as follows:

1. On October 15, 1973, Mrs. Betty Ponce received an anonymous telephone call ordering her to pay $7,000.00 if she ever wanted to see her daughter and granddaughters alive [RT 377, 2824, 2825].[2]

2. An investigation revealed that her daughter and granddaughters were missing and had apparently suffered bodily injury at their residence [RT 217]. The

[2]References are to pages in the Reporter's Transcript. Pursuant to Rule 12, Appellant is arranging with the Clerk of San Bernardino Superior Court to send relevent portions of the record to this Court under separate cover.

Sheriff's Department thereupon instigated an extensive investigation and surveillance [RT 265 *et seq.*]. Later, it was revealed that the granddaughters and daughter had been murdered.

3. Pursuant to further anonymous telephone orders, Mrs. Ponce proceeded to drive around the San Bernardino area and to drop off the ransom money at a certain location. Throughout this time, Mrs. Ponce was under extensive surveillance by the Sheriff's Department [RT 273, 275].

4. During this period of time, Appellant's co-defendants were observed making telephone calls. It was later determined that the phone calls received by Mrs. Ponce were from the same telephone booth where Appellant's co-defendants had been observed [RT 431, 437].

5. Mrs. Ponce left $7,000.00 in cash at a phone booth located at the intersection of Baseline and Waterman Avenues [RT 398].

6. The money was then picked up by a "black man", who was apprehended but later, inexplicably, released [RT 419, 429].

7. Mrs. Ponce then proceeded to drive around the San Bernardino area for several more hours and finally deposited the money a second time in a paper bag in a shopping cart at a service station located at Baseline and Arrowhead Avenues [RT 413, 414].

8. *Throughout the entire surveillance of some five and one-half hours, Appellant was never observed.*

9. Finally, several hours after the money was dropped off a second time, Appellant was seen walking behind the service station [RT 570, 582]. Appellant

was seen to approach the shopping cart, look in the bag, picked up the bag and put the money in the trunk of his car [RT 499, 501, 502].

10. Appellant then drove off, followed by Sheriff's officers [RTA 928].

11. The officers observed that *after* Appellant picked up the money, he circled the spot where he had picked it upon on a map which he carried in his glove compartment [RT 928].

12. The officers followed Appellant for some time and even had an undercover officer approach him and question him [RT 940, 1036, 1037]. *However, nothing in any way incriminating was discovered.*

13. Appellant was placed under arrest. *A thorough search of Appellant's car revealed neither weapons nor blood stains, nor any other evidence which in any way connected Appellant with either the kidnapping nor the murder of the victims, which was subsequently revealed* [RT 1038, 1053].

14. Throughout the investigation and subsequent trial, Appellant continually denied any complicity in the crime, stated he had merely found the money, and had marked the spot on the map in order to tell the police where he had found it [RT 2945, 2946].

15. Appellant's testimony was corroborated by his co-defendants, who testified that they had never seen Appellant before.

16. Appellant's testimony was further corroborated by presentation of exculpatory evidence which placed Appellant far from the scene of the crime, engaged

in totally innocent errands, during the very time that the ransom money was originally scheduled to be dropped off.

17. The prosecution presented evidence that Appellant owned a white car and that the co-defendants were seen in a "white car". However, cross examination revealed that the co-defendants had been seen riding in a car with "big fins" whereas Appellant's car had no fins [RT 1923].

18. *During the entire trial absolutely no evidence was presented to link Appellant with either the seizure and carrying away of the victims or the infliction of any bodily injury upon them.*

B. The Proceedings.

1. Complaints were filed in the Municipal Court of San Bernardino charging Appellant with four counts of murder and four counts of kidnapping with bodily injury on October 17, 1973.

2. A preliminary hearing was set for November 1, 1973, and Appellant appeared with his counsel on that date prepared to proceed.

3. However, only minutes before the hearing was set to commence, Appellant was informed that he had been committed by Indictment before the Grand Jury. An examination of the Grand Jury Transcripts[3] reveals that the prosecutor withheld from the Grand Jury the fact that the first time the money was dropped off, it had been picked up by a black man who was apprehended, but subsequently released. The prosecutor also failed to present the Grand Jury with any

[3]These are being forwarded to this Court under separate cover.

of the exculpatory evidence showing that Appellant was engaged in innocent errands at the time the money was originally scheduled to be dropped off.

4. On November 1, 1973, Appellant was arraigned in the Superior Court and counsel was appointed [CT 7].[4]

5. On November 13, 1973, Appellant pled not guilty on all counts.

6. On December 3, 1973, January 21st and January 23rd and February 4, 1974, Appellant moved for a Change of Venue and for a separate trial, claiming that because of the widespread, hostile publicity against him and the overwhelming amount of evidence against his co-defendants, he could not receive a fair trial in San Bernardino County [CT 65-71, 90]. However, all motions were denied.

7. On December 11, 1973, Appellant's Motion to Dismiss the Indictment for lack of evidence against him was denied [CT 48, 63].

8. On January 23, 1974, the proceedings commenced in a high security courtroom complete with blinking lights, bulletproof glass, locked doors, and a veritable army of armed guards [RT Augmented 16, 17]. Appellant's counsel objected to the use of such a courtroom because of the inference that it created that Appellant was highly dangerous and the prejudicial impact of that inference upon the jury [CT 71, 72]. However, the Court overruled these objections since, as the Court of Appeals stated, the bulletproof glass and other precautions were considered necessary

[4]The entire Clerk's Transcript [CT] is being forwarded to this Court pursuant to Rule 12.

to (a) protect the defendants against murderous assaults by relatives of the victims who were sitting in the audience and (b) prevent escape [See Ex. B, pp. 13-14].

9. On the first day of jury selection, the defendants were present before the jury in leg irons surrounded by heavily armed guards. After objection, the leg irons were removed [RT Augmented 16, 17]. Nonetheless, the defendants were subsequently paraded before the prospective jurors once more in leg irons on a later day [RT Augmented 92, 93].

10. On January 23, 1974, Appellant's counsel objected that armed guards were present at the counsel table and were preventing him from conferring with his client. He then requested that the guards be ordered to stand back a reasonable distance, so that he might talk privately with his client. However, the Court denied this request [CT 75] and the guards continued to prevent private consultation throughout the trial.

11. On February 5, 1974, trial commenced and continued with presentation of evidence and arguments until March 20, 1974, at which time all sides rested.

12. After the prosecutor's opening argument to the jury, and before the defense counsel had argued, the trial judge informed the jury that they might start forming their opinion of the case [RT 3122, line 19 *et. seq.*].

13. Prior to the case being submitted to the jury, Appellant's motion for acquittal on the grounds that the charges against him were totally devoid of evidentiary support was denied [RT 2836].

14. The jury was instructed and retired to deliberate.

15. The jury found the Appellant innocent of the murders of the victims, but guilty of kidnapping with *bodily injury* despite the fact that the *only* bodily injury alleged was the murders.

16. Motions for new trial based, *inter alia,* on insufficiency of the evidence and logical inconsistency of the verdict, were denied [CT 358-359].

17. On April 10, 1974, Appellant was sentenced to *life imprisonment without possibility of parole* [See Ex. "A"].

18. Appellant's conviction and sentence were upheld by the California Court of Appeal and the California Supreme Court [See Exs. B, C and D].

19. Appellant filed timely Notices of Appeal to this Court [Exs. F, G and H] and this Appeal follows.

The Questions Are Substantial.

Appellant herein will demonstrate, (1) pursuant to Rule 15(1)(d) how the federal questions are presented in this case, and (2) pursuant to Rule 15(1)(e) and (f), and *Zucht v. King,* 260 U.S. 174, 176, 177, why the questions presented are so substantial as to merit plenary review.

1. The first question presented is whether or not appellant's conviction for kidnapping with bodily injury is so totally devoid of evidentiary support as to be violative of Due Process.

In *Thompson v. Louisiana* (cited *supra*) this Court stated that:

> "Just as conviction upon a charge not made would be sheer denial of 'due process', so is it a violation of due process to convict and punish a man without evidence of his guilt."

Thus, a gross insufficiency of the evidence may present a Federal question.

In the instant case, Appellant raised this very question as a ground for his motion for acquittal at trial. Furthermore, on appeal, Appellant expressly contended that to hold him guilty of kidnapping *with bodily injury* and consign him to *life imprisonment without possibility of parole* on the basis of the total lack of evidence presented at Trial was "contrary to the precept of Due Process of laws guaranteed by the United States . . . Constitution" (App. Op. Br. in the California Court of Appeal, p. 111).

It would certainly appear that the question of whether the evidence is sufficient to support a finding that Appellant was guilty of kidnapping *with bodily injury* is a substantial one meriting review.

A. The Evidence Does Not Support Appellant's Conviction for Kidnapping.

The *only* evidence against Appellant was that he picked up the ransom money and that he owned a white car and that the co-defendants were also seen in a white car.

In regard to the ransom money, it must be noted that another man had previously picked up the money and had been apprehended but later released. It was only several hours after the money had been "dropped" a *second* time that Appellant picked up the money. It is submitted that no "bag man" in a kidnapping would leave the ransom money lying around and allow someone else to pick it up, and then leave it around at a second drop site for hours more before retrieving it.

In regard to the "white car", it is noted that the description of Appellant's car which did not have "big fins" and that of the co-defendant's car, which did, was very vague and factually inconsistent.

When one considers also Appellant's testimony that he was far from the scene of the pickup engaged in innocent errands when the money was first dropped off, and the uncontradicted testimony of the co-defendants that they did not know Appellant, it becomes highly doubtful that the evidence is sufficient even to find Appellant guilty of simple kidnapping.

B. The Record Is Totally Devoid of Any Evidence to Support the Jury's Finding That Appellant Was Guilty of Kidnapping With Bodily Injury.

During the entire Trial there was absolutely no evidence that Appellant was in any way connected with the murders of the victims. The murders of the victims were the *only* bodily injury inflicted upon the kidnap victims. Therefore, the jury, by finding Appellant innocent of the murders, found that he, logically, could not be guilty of inflicting bodily injury. Therefore, given the Appellant's acquittal on the murder charges, this conviction for kidnapping *with bodily injury* is logically insupportable and must be deemed to be totally devoid of evidentiary support.

It is noted that this Court has never considered the applicability of the *Thompson v. Louisville* doctrine to the kind of logically inconsistent verdict involved in the instant case and it would certainly seem that this question is a substantial one meriting review.

2. The second question presented by this Appeal is whether or not, given the very weak nature of

the case against Appellant, a number of factors present at Trial, either individually, or cumulatively, were so prejudicial that Appellant may be said to have been denied a fair Trial and due process of law.

a. The first subsidiary question here is whether the District Attorney's failure to divulge exculpatory evidence to the Grand Jury compels a reversal.

In *United States v. Ash*, 413 U.S. 300 (1974), this Court noted that a prosecutor's duty to divulge evidence favorable to the defendant is *not* limited to the actual Trial, but rather extends throughout the criminal process. It follows that a prosecutor has a duty to present exculpatory evidence to the Grand Jury. Moreover, it would seem that such a duty could be logically implied from the functions of the Grand Jury. That body is supposed to weed out groundless and unsupported charges in order to prevent a defendant from being forced to undergo the rigors of a criminal trial without good cause. It is urged that the Grand Jury cannot perform this function if the prosecutor can withhold exculpatory evidence from the Grand Jury from which that body might conclude that there is no probable cause to believe the accused is guilty of the offense charged.

In the instant case, it is obvious that the District Attorney deliberately held back exculpatory evidence that another man had picked up the ransom money before Appellant and had been let go. This was clearly exculpatory since the Grand Jury, had they known this, could have concluded that Appellant, like the other man, had picked up the money by accident or, alternatively, that the other man, and not the Appellant, was the real "bag man" in the kidnapping. Moreover, the District Attorney withheld crucial exculpatory evidence which established that Appellant was engaged in innocent errands when the money was dropped off.

It is submitted that the question of whether the prosecution's failure to present this exculpatory evidence to the Grand Jury constitutes a violation of Due Process and reversible error is a substantial Federal question meriting review.

b. The next subsidiary question is whether the denial of a Change of Venue constituted a denial of a fair Trial and Due Process sufficient to compel a reversal under *Sheppard v. Maxwell* (cited *supra*).

In *Sheppard*, this Court stated that:

> "Due Process requires that the accused receive a fair Trial by an impartial jury. Given the pervasiveness of modern communications and the difficulties of effacing prejudicial publicity from the minds of the jurors, the Trial Courts must take strong measures to insure that the balance is never weighed against the accused . . . Where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair Trial, the Judge should continue the case until the threat abates or transfer it to another County not so permeated with publicity" (*Sheppard*, cited *supra*, at 361).

In *Sheppard*, the Court found that failure to grant a change of venue compels reversal of a criminal conviction subsequently obtained.

Of course, the mere existence of adverse publicity does not automatically require reversal. The question

in every case is whether the pretrial publicity resulted in prejudicing the Trial proceedings to such an extent that it can reasonably be said that the defendant was denied a fair Trial [compare *Murphy v. Florida*, ... U.S. ....; 44 L.Ed.2d 589 with *Estes v. Texas*, 381 U.S. 532; *Irwin v. Dowd*, 366 U.S. 717].

In the instant case, however, it strongly appears that the pretrial publicity created a climate of hostility against the Appellant which deprived him of a fair Trial.

The publicity in this case manifested in 42 separate newspaper articles, included such items as a front page headline entitled "Ransom Payment Fails To Save Four —They Won't Know They're Buying Corpses" [Ex. MM], a front page story of a massive funeral for the victims attended by 3,200 people including pictures of the victim's grieving mother [Ex. H], and a statement by a relative of the victims demanding death for the defendants [Ex. CC].[5]

In denying change of venue motions, the Trial Judge conceded that the publicity was unsually extensive and inflammatory [CT 47, *et seq.*]. It is noted that this publicity continued up to and even during the Trial.

The effect of this publicity was to inflame the residents of San Bernardino County to such a fever pitch as to make a fair Trial in that County impossible.

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[5]All Exhibits submitted in support of the Change of Venue Motions are being sent to this Court pursuant to Rule 12.

At least three jurors admitted to exposure to this publicity. But even those who had not been exposed to the publicity itself, could hardly have been uninfluenced by the hostility which it engendered. So great was the hostility in the Courtroom that special bullet-proof glass was installed to protect the defendants against rumored assaults from relatives of the victims sitting in the audience. An army of armed guards watched the defendants' every move and dragged them before the jury in chains (See Statement of the Case, *supra*, at pp. 7-13].

Moreover, the effect of the hostility on Appellant's Trial was particularly aggravated since, as a result of the denial of his Motions for separate Trial, he was forced to stand Trial with two co-defendants who were, beyond doubt, the kidnappers and murderers of the victims, whereas Appellant's only alleged involvement was picking up the ransom money. Most of the publicity and resulting hostility had been directed toward the co-defendants and the effect of the joint Trial could only have been to allow Appellant to be prejudiced by association with them in the minds of the jury.

It is submitted that no jury could have objectively evaluated Appellant's guilt or innocence in the above-described hostile atmosphere and that the combination of the above factors deprived Appellant of a fair Trial and Due Process of Law.

c. A third subsidiary question here is whether or not Appellant was denied his right to counsel due to the fact that armed guards at the counsel table prevented him from conferring with his counsel during Trial.

No right is more basic to Due Process than the right to effective assistance of counsel guaranteed by the Sixth Amendment and that right is rendered meaningless if counsel is prevented from conferring with his client in private and if counsel and client must fear that anything they say may be heard by the guards and used against them. It is submitted that this factor alone is so serious a deprivation of Due Process as to demand a reversal of Appellant's conviction.

d. A final question concerns the statement of the Trial Judge that the jury could start forming their opinion of the case before hearing defense counsel's argument. That statement, given the context of the entire proceedings, was, in effect, a direction to the jury that the defendants were guilty as charged and that nothing defense counsel could say could possibly make a difference. This Court has recently stressed that it is reversible error to deny defense counsel the right to attempt, in a closing argument, to persuade the trier of fact of a defendant's innocence. (See *Herring v. New York*, ... U.S. ....; 45 L.Ed.2d 593).

It would certainly seem inconsistent with the spirit of the *Herring* opinion to allow a Judge to imply

to a jury that they may make up their minds before hearing from defense counsel.

Finally, assuming, *arguendo,* that none of the above mentioned factors are sufficient, in and of themselves, to compel a reversal, or to grant plenary review, it is submitted that the *cumulative* effect of all of the above factors, should create at least enough doubt as to the fairness of the proceedings resulting in Appellant's conviction so that this court should grant plenary review in order to allow the Appellant to prove that he was, in fact, denied a fair Trial. Surely, given the fact that Appellant now faces a sentence of *life imprisonment without possibility of parole as* a result of this conviction, that is not too much to expect.

3. The third and last question presented by this Appeal is whether or not California Penal Code Section 209, which provides that *all* persons found guilty of kidnapping with bodily injury shall be committed to life imprisonment without the possibility of parole, is a cruel and unusual punishment under the Eighth Amendment.

There appears to be a conflict on this issue between the State Courts. The Kentucky Court of Appeal has held in *Workman v. Commonwealth,* 429 S.W.2d 374, that life imprisonment without parole may be a cruel and unusual punishment in certain circumstances. On the other hand, other State Courts have upheld this penalty as constitutional [See annotation: length of sentence as violation of Constitutional Provisions Pro-

hibiting Cruel and Unusual Punishment in 33 A.L.R.3d 335]. Therefore, a decision by this Court is needed to resolve the apparent conflict between the State Courts and to assure uniformity of decision.

One of the important subsidiary issues here is whether the penalty of life imprisonment without possibility of parole is so psychologically degrading as to be an inherently cruel and unusual punishment regardless of the crime for which it is imposed. In *Trop v. Dulles,* (cited *supra*), this Court noted that psychologically cruel, as well as physically cruel, punishments, may violate the Eighth Amendment. In that case the Court held that banishment was a cruel and unusual punishment partly because it deprived a man of all hope of ever seeing his friends and family again.

Certainly, a strong argument can be made that life imprisonment without possibility of parole inflicts a psychologically cruel punishment in a similar sense since, even more surely than banishment, it inflicts upon a man the mental anguish of knowing that he can have no hope of ever rejoining his loved ones no matter what he may do. There is mounting evidence that this punishment is in fact even crueler than the death penalty since it consigns its victims to a "living death" and has a uniquely devasting impact on their will to live. Moreover, it is highly doubtful whether such sentences serve any legitimate penal purpose whatsoever (See, "Condemned Without Hope in California", 7 The Review of The International Commission of Jurists, 17, 18).

Even assuming *arguendo* that this penalty is not so inherently cruel as to violate the Eighth Amendment, the question remains as to whether this penalty is so disproportionately severe as imposed on this particular offender for his particular offense as to constitute a cruel and unusual punishment within the meaning of *Weems v. U.S.* (cited *supra*). In this connection it is noted that this particular offender has no prior criminal record whatsoever. His only involvement in the instant crime, if any, was picking up the ransom money and it is indisputable that he was in no way involved in the seizing and carrying away of the kidnap victims nor in the inflicting of any injury upon them. Yet, he finds himself consigned to prison for life without possibility of parole just as if he had been directly involved in the abduction and the murders. This is because California Penal Code Section 209 allows for no differences in sentencing based upon the nature of one's involvement in the kidnapping.

Moreover, it is noted that California allows the possibility of parole to convicted murderers, rapists, and to all other serious offenders, while denying parole *only* to kidnappers [See Ex. K]. Such a disparity in sentencing patterns seems arbitrary and raises not only Eighth Amendment questions but equal protection questions as well.

Finally, it is noted that California's penalty for this offense is among the most severe of any in the nation [See Ex. L].

For all of these reasons, this Court should grant a hearing on this issue.

Conclusion.

For the foregoing reasons, it is submitted that plenary review in this case should be granted in order to decide important Federal Constitutional issues and in order to prevent a gross miscarriage of justice.

Respectfully submitted,

NASATIR, SHERMAN & HIRSCH,
MICHAEL D. NASATIR,

WEITZMAN AND FIDLER,
HOWARD L. WEITZMAN,

Attorneys for Appellant,
Phillip E. Walters.

FILED

DEPT. No. 5 CASE No. CR29660

In the Superior Court of the State of California

IN AND FOR THE COUNTY OF San Bernardino

ABSTRACT OF JUDGMENT
(Commitment to State Prison as provided by Penal Code Section 1213.5)

Hon. JOSEPH A. KITE

The People of the State of California vs. PHILLIP SIMON WALTERS, Defendant

Lowell E. Peterson

C. A. Broderick

The records show that on the 10th day of April, 19 71 judgment of conviction of the above-named defendant was entered as follows:

In Case No. CR29660 Count No. V, VI, VII & VIII he was convicted by Jury of the crimes of not guilty (guilty, not guilty, former conviction or acquittal, once in jeopardy, insanity, or other plea or finding) committed KIDNAPPING For Robbery, A felony

Section 209, Penal Code, With finding that victim Was Not Harmed

Backward as to Counts V, VI, VII & VIII, were previously dismissed and plea of not guilty entered as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION

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Defendant was committed on the ... day of ... and has been sentenced as follows: ... Defendant was granted ... days credit on account of the time he has been confined prior to the pronouncement of judgment. ... Defendant was ordered committed to the custody of the Director of Corrections at the State Prison at ... as provided by law. ... Execution of sentence imposed is hereby suspended and defendant placed on probation for the term prescribed by Section 1203.1 of the Penal Code subject to the conditions of probation heretofore ordered by the court. ... Sentence suspended. Defendant placed on probation for the term prescribed by Section 1203.1 of the Penal Code subject to the conditions of probation heretofore ordered by the court. ... Pursuant to Section 1202.5 of the Penal Code, the court ordered that defendant not possess a firearm during the period of probation. ... Pursuant to Section 1203.1c of the Penal Code, defendant was ordered to pay a fine of $ ... to the County Treasurer, ... Pursuant to Section 1203.1b of the Penal Code, defendant was ordered to pay the cost of probation supervision in the amount of $ ... to the Probation Officer, ... Pursuant to Section 1203.1 of the Penal Code, defendant was ordered to pay restitution in the amount of $ ... to the victim(s) of his crime or to the Restitution Fund. ... Pursuant to Section 1203.1 of the Penal Code, defendant was ordered to pay restitution in the amount of $ ... to the victim(s) of his crime or to the Restitution Fund. ... Pursuant to Section 1203.1 of the Penal Code, defendant was ordered to pay restitution in the amount of $ ... to the victim(s) of his crime or to the Restitution Fund.

EXHIBIT A.

BEST COPY AVAILABLE

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished as provided by law, and that he be committed to the Sheriff of the County of San

Bernardino and that he be then delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is further ordered that sentence shall be served in respect to the counts as follows: concurrently

and in respect to any prior incompleted sentence(s) as follows: concurrently

To the Sheriff of the County of San Bernardino and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at California Institution for Men at Chino, California

at your earliest convenience.

Witness my hand and seal of said court

this 10th day of April 1974

V. DENNIS HARRIS Clerk

by Alfred W. Johnson Deputy

State of California }
County of San Bernardino } ss.

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code section 1213.

Witness my hand and seal of the said Superior Court this 10th day of April 19 74

V. DENNIS HARRIS County Clerk and ex-officio Clerk of the Superior Court of California in and for the County of San Bernardino

By JOSEPH A. [illegible] Judge of the Superior Court of the State of California in and for the County of San Bernardino

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EXHIBIT B.

Opinion.

Court of Appeal, Fourth District, Second Division, State of California.

People of the State of California, Plaintiff and Respondent, vs. Norbert Deiter Meier, Edward Joseph Montoya, and Phillip Elwon Walters, Defendants and Appellants. 4 Crim. 6474 (Sup.Ct. CR-29660).

Filed: July 9, 1975.

APPEAL from the Superior Court of San Bernardino County. Joseph A. Katz, Judge. Affirmed.

Fred H. Dill, under appointment by the Court of Appeal, for Defendant and Appellant Meier.

Robert M. Castle, under appointment by the Court of Appeal, for Defendant and Appellant Montoya.

Howard L. Weitzman for Defendant and Appellant Walters.

Evelle J. Younger, Attorney General, and Jay M. Bloom, Deputy Attorney General, for Plaintiff and Respondent.

Each of the 3 defendants was indicted on four counts of murder and four counts of kidnaping for ransom in which the victim suffered bodily harm. The court entered a so-called gag order re publicity, denied motions for change of venue and severance and overruled objections to security measures taken. All 3 defendants were then found guilty on the kidnaping charge. Walters was found not guilty of the murder charge, but Meier and Montoya were found guilty of four counts of murder in the first degree.

This case took almost two months to try. The reporter's transcript is almost 3400 pages in length. The clerk's transcript over 200 pages in length. The very excellent briefs filed by all of the attorneys total almost 400 pages. In presenting a brief statement of facts, it should be kept in mind that this court must view the evidence in a light most favorable to the judgment and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Reilly*, 3 Cal. 3d 421, 425.)

Mrs. Evans and her husband owned a green, 1969 Plymouth Roadrunner. She was in the process of divorcing Mr. Evans. She met Meier,[1] and they began dating and driving the Roadrunner. Meier was contemplating a divorce from his wife (hereafter Mrs. Sanchez). Mrs. Evans went to Fresno. Meier went to Fresno and began to live with her. Meier said he was going to be free of Mrs. Sanchez before Mrs. Evans was free of Mr. Evans. Montoya came to Fresno and talked about a gun and killing someone, said that he was good with knives and would be rich someday.

On October 12, 1973, Mrs. Evans returned home to find the Roadrunner missing. She also discovered that her apartment had been ransacked and that surgical gloves, masking tape, surgical tape, scissors, a knife and razor blades were missing.

On October 14, 1973, Meier and Montoya were seen together in San Bernardino County. They were driving a white Chrysler.

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[1]Generally, we shall refer to the defendants by their surnames rather than designating them as defendants each time they are mentioned.

On that date, Mrs. Sanchez was living with her daughter Toni, age 15, and her son David, age 13. On that date, John McGrail, age 19, was visiting the Sanchez family. None of the four were seen alive after that date.

At about 11 p.m., neighbors heard screams from Mrs. Sanchez' house.

On October 15, 1973, Mrs. Ponce, mother of Mrs. Sanchez, received a phone call. The caller said that Mrs. Sanchez and her children were being held hostage. He said they would never be seen alive unless $7,000 ransom was paid. Mr. Ponce then went to Mrs. Sanchez' house, found numerous bloodstains and some broken glass. The police were called.

Arrangements were made for a telephone trap on the Ponce phone. Mrs. Ponce then received a call to bring the money to Baseline and Waterman. The voice sounded as though the caller were of Mexican descent. Mrs. Ponce went to Baseline and Waterman. Meier and Montoya were seen in that area driving the green Roadrunner. Mrs. Ponce received another call which was traced to a phone booth on Waterman one block from Baseline. Mrs. Ponce put the money in a phone booth. Someone, unconnected with the kidnaping, picked up the money. It was recovered. Mrs. Ponce then received another call to take the money to 40th and Sierra Way. At the time this call was made, Meier and Montoya were seen at a nearby phone booth making a telephone call. They were still driving the green Roadrunner. It was seen to pass 40th and Sierra Way. Mrs. Ponce went to a phone booth and waited. Montoya was seen to make a phone call from a telephone booth. Mrs. Ponce received a

call to put the money in a shopping basket behind a service station at Baseline and Arrowhead. This she did. Meier and Montoya were seen nearby. Mrs. Ponce received another call and at the same time Montoya was seen making a call. This time she was sent to a third area. Walters was seen in the rear of the service station. He walked up to the basket which contained the money. He looked around a few times, picked up the bag which contained the money, opened it, checked the contents, then walked to a white Chrysler where he put the money in the trunk. He was arrested. When he had approached the area of the service station, he was observed to be looking at a street map. The map was recovered and it had a circle around the intersection of Baseline and Arrowhead. Montoya and Meier were in the area of the service station. They entered the Roadrunner and were arrested.

An investigation at the Sanchez house revealed much blood, notes which said, "Grandma and Grandpa", "Not less than five thousand", "Dear", "Graranda", "7" and "thoua". A bloodstained towel, a bloodstained adhesive tape and a bent bloodstained knife were found. An iron cord was missing.

The Roadrunner contained numerous bloodstains and vomit stains, together with a child's panties, rubber gloves and scissors. A floor mat was missing from the Roadrunner. The bloodstains in the Sanchez home were of the type of blood of John McGrail and Meier. The blood in the Roadrunner was of the type of Walters, John McGrail and Toni Sanchez and Mrs. Sanchez. Of the notes in the Sanchez house, two had been written by Toni, one by Meier.

The next day the bodies of Mrs. Sanchez, Toni, David and John McGrail were found in the San Bernardino Mountains.

Mrs. Sanchez was tied at the knees and neck. David had an appliance cord wrapped around his neck. His hands had been taped with adhesive tape. John McGrail's throat had been cut from ear to ear. Toni was in a pool of blood. A knife blade and handle and a rubber floor mat were found next to the bodies. A pair of scissors was found near Toni. A bloodstained baseball bat was found near Mrs. Sanchez. Tire tracks similar to those of the Roadrunner were found. A pair of nylon underpants had been stuffed into Mrs. Sanchez' mouth. The body had been moved after death. She had died from cerebral bruises and hemorrhage as a result of injuries to the face and head causing skull fractures. David had been strangled. John's throat had been cut and he had sustained a severe cut on the head. Toni died from massive skull fracture which could have been caused by a baseball bat.

In summary, reasonable inferences may be drawn from this evidence that *Meier* and *Montoya* decided to kidnap and kill Mrs. Sanchez and her children and to shake down the mother of Mrs. Sanchez for ransom. It was necessary that they kill Mrs. Sanchez and the children since they knew Mr. Meier who had originally been married to Mrs. Sanchez. They then stole Mrs. Evans' car as instrumentalities of the murder-kidnaping. They entered the Sanchez property, killing some of the occupants there. Apparently, the girl, Toni, had been forced to write a ransom note. Obviously, some of the bodies were still alive when taken from the house, probably the children as they

vomited in the car because of the shock and horror of having seen the death of their mother and probably John McGrail. All four, alive and/or dead, were then taken to the mountains and the survivors were slaughtered. John McGrail, of course, was simply the tragic victim of being at the wrong place at the wrong time. The defendants then attempted to get $7,000 from Mrs. Sanchez' mother although the victims of the ransom were already dead. Walters was the pickup man and a reasonable inference can be drawn that he was in on the transaction from at least the day before the pickup. It can be inferred that he was in this capacity because Meier and Montoya were "hot," Meier because of his relationship with Mrs. Sanchez and both because they were driving a stolen car which at that time contained evidence of the murder-kidnaping.

Aspects of this case bear a chilling resemblance to Truman Capote's "In Cold Blood." It is difficult to conceive of a more cold-blooded, premeditated, planned execution of innocent people. However, it is not for this court to pass moral judgment on the defendants. The jury and the trial court have already done this. It is our responsibility to search the record to ascertain whether or not these defendants received a fair trial, free from prejudicial error.

Contentions and dispositions:

(1) Walters and Montoya contend that prosecution by indictment deprived them of due process and equal processes under the law.

This contention has been answered in *People v. Sirhan,* 7 Cal. 3d 710, at pp. 746-747. We need

not repeat the anaysis and rationale set forth in that case.

(2) Walters contends that the grand jury is an executive agency making judicial determinations thereby violating the principles of separation of power.

People v. Superior Court (1973 Grand Jury), 13 Cal. 3d 430, at pp. 438-439, makes clear that the grand jury is a judicial body. Again, we need not repeat or attempt to paraphrase that holding.

(3) Walters contends that he was deprived of his constitutional rights because the district attorney chose to go the grand jury route although he had already filed a criminal complaint.

The prosecution may take either route (*People v. Goodspeed,* 22 Cal.App. 3d 690, at pp. 704-705) even after a magistrate dismisses the complaint (*People v. Uhlemann,* 9 Cal.3d 662, 664). Again, it is unnecessary to repeat the analysis and rationale of those holdings.

(4) Walters contends that indictment by grand jury is unconstitutional since the law does not provide for representation by counsel for a defendant before that body.

A potential defendant is not constitutionally entitled to representation before a grand jury. (*In re Groban,* 352 U.S. 330; *People v. Dale,* 79 Cal.App. 2d 370.) If the Legislature wishes to provide for counsel, it may do so. However, this court may not by judicial fiat impose such a requirement as a matter of constitutional requirement.

(5) Walters complains that the district attorney failed to disclose to the grand jury exculpatory evidence

(the fact that someone else first picked up the money and the existence of a receipt from a store which would indicate a reason for his being where he was when he picked up the money).

The contention is without merit. It is clear that the man who picked up the money just happened into the telephone booth, picked up the money thinking it was lost or accidentally left there. There was nothing from this evidence which would in any way benefit any of the defendants. The receipt which Walters contends would give him reason for being in the area where he was when he picked up the money was eventually put into evidence as part of his defense. In no way would it exculpate Walters. It merely corroborated his story as to why he was in this area. Walters took the stand and admitted he was the one who picked up the money but denied being part of the murder-kidnaping plot. The introduction of this evidence before the grand jury would have been of no assistance to Walters.

(6) All three defendants contend that the court should have granted their motion for a change of venue.

The test to be applied in the trial court was whether the defendants had shown a reasonable likelihood that in the absence of such a change a fair trial could not be had. On appeal, the test is based on our independent evaluation of the circumstances whether the defendants had a fair trial. (*Frazier v. Superior* Court, 5 Cal. 3d 287, 294; *People v. Sommerhalder*, 9 Cal. 3d 290, 301.)

The newspaper coverage prior to the gag order covered the murders, the kidnapings, the search for the

bodies, their burial and the arrest of the defendants. Considering the nature of the crimes perpetrated by these defendants, the stories are remarkably restrained. No opinion as to guilt is to be ascertained and there is no appeal to passion or prejudice. Admittedly, these stories do not sound like the report of a PTA meeting. However, the actions of these defendants were such that news stories other than drab recitations are to be expected. The stories contained no confessions. The prosecutor either was not interviewed or, if he was, he did not see fit to give his views of the case. The coverage was not inflammatory or unduly sensational. When the case came to trial, some three months later, it would appear that the story had lost some of its zest. The jurors finally chosen after an extensive and thorough voir dire clearly had not been influenced by newspaper stories.

These jurors were:

(a) Juror Swi[illegible] who had read headlines, had not followed the stories, had no preconceived notions as to guilt or innocence.

(b) Juror Lemke who had read nothing of the case.

(c) Juror Enciso who had read nothing of the case.

(d) Juror Uray who had read nothing of the case.

(e) Juror Lemaster who had read nothing of the case.

(f) Juror Bengel who had only read that the crimes had occurred, had not read extensively, could not remember the names of any of the defendants or anything about the facts of the case.

(g) Juror Miller who had not read or heard reports of the case.

(h) Juror Olsen who had not read or heard reports of the case.

(i) Juror Williams who had read about the deaths of the victims but was uninfluenced by what she had read.

(j) Juror Vanalstine who had not read anything about the case.

(k) Juror Granados who had not read anything about the case.

(l) Juror Chappel who had not read anything about the case.

Thus only three jurors remembered reading anything about the case. The coverage, such as it was, apparently left little impact on the general population of San Bernardino County. In this respect, it must be kept in mind that San Bernardino is a metropolitan area. San Bernardino County has a population of 684,072 people. The parties involved, both victims and defendants, were not persons of great public prominence. None of them were known to the jurors.

Thus our independent evaluation of the record in this case satisfies us that the defendants received a fair trial unaffected by such newspaper publicity as had existed.

(7) Each defendant contends that the court erred in not granting a motion for severance.

The Legislature has expressed a preference for joint trials (Penal Code, § 1089). Whether to grant such a motion is a matter left peculiarly to the sound discretion of the trial judge. The trial judge denied

the motion for severance and in so doing committed no error. The answer to the contention that error was made is two-fold:

(a) The defendants have not afforded us a record of the severance hearing in order for us to properly review the matter.

(b) On the basis of the record available to us, this contention is without merit. Tested by applicable standards, we find:

(1) No extra-judicial statements were made by any one defendant which incriminated another.

(2) There was no prejudicial association between the defendants. They were all, equally implicated.

(3) All were charged with the same offense and there was no occasion for confusion or any multiple counts involving some defendants but not the others.

(4) There were no conflicting defenses. All the defendants had alibis for the 14th and 15th and each sought to justify his actions when under surveillance on the 15th by offering innocent explanations for his conduct.

(5) There is nothing to indicate that any defendant would have given new testimony exonerating another defendant.

(8) Meier and Montoya complain that they did not get enough sleep.

The prisoners had breakfast every morning at 3 a.m. There is nothing particularly startling about this. It happens in every metropolitan county in the state. The sheriff has to pick up his prisoners, feed them and get them to the various courts on time. The

prisoners were then returned to jail at 6 p.m. They complain that the jail was noisy. Most jails are. Meier complains that he was put in solitary. This was his own fault as he had broken the jail rules. The lack of sleep of Meier and Montoya has nothing to do with their having received a fair trial. Additionally, Montoya complains because the judge did not order the jail to give him hot food. We find no comment necessary in regard to this contention.

(9) Meier and Montoya object to the fact they were shackled when moved around the courthouse.

This was no second degree burglary. Of course, the defendants were shackled. However, the court ordered that they not be shackled in front of the jury. They now complain the jurors saw them coming down the halls in the court while shackled. This could have come as no great surprise to the jurors who, after all, are possessed of common sense. There is nothing so horrifying in seeing shackled prisoners that we are going to read into this any kind of prejudice which deprived either of these defendants of a fair trial.

(10) Meier complains that the court erred in not having a recess during part of his testimony.

This contention is frivolous and not worthy of further comment.

(11) Meier and Walters contend that they were deprived of a fair trial because deputy sheriffs were too close to them during the trial.

It must be remembered that these men were charged with the most serious offenses under our Penal Code. There was certainly nothing wrong with having deputies in the courtroom in addition to the usual bailiff. Apparently the courtroom is small and of necessity the deputies were close to the defendants and their counsel. Under these circumstances, it simply becomes necessary for counsel and his client to talk in whispers.

(12) All three defendants complain of security procedures in the courtroom.

The court may impose proper security measures considered necessary to detain the defendants to protect the defendants and to maintain order in the courtroom. Here, bulletproof glass separated the audience from the defendants. Considering the nature of the crime charged it was entirely reasonable to separate these defendants from those in the audience because it would not have been at all surprising for someone in the category of Mr. Ponce to have decided to take the law into his own hands. In addition, considering the type of charge and the type of sentence faced by these defendants, it would not have been at all surprising had they attempted an escape. There was no abuse of discretion in the security procedures adopted in this case.

(13) Meier next complains that the jury may have heard a conversation between the district attorney and his investigator which reflected on his (Meier's) credibility.

Without holding a hearing to determine whether the charge is true, the court merely admonished the jury not to consider any comment it may have heard. It is assumed that the jury is able to follow the court's instruction and if a juror did hear a comment of the district attorney which expressed his disbelief in the veracity of Meier, again, it probably would have come as no particular shock to that juror nor

could it possibly have influenced the juror. Lawsuits are adversary proceedings and jurors are intelligent enough to know this.

(14) Meier and Montoya complain that the district attorney asked Mrs. Evans leading questions.

We have read the questions. Most of them were not leading and the court properly so ruled. The court sustained objections to 8 questions. There was no misconduct.

(15) Meier complains because he was forced to give the prosecution a sample of his handwriting.

In this connection, he argues:

(a) That his Fourth Amendment rights were violated. No objection was made on that ground and, therefore, the matter may not be considered for the first time on appeal. (*People v. Jenkins,* 13 Cal. 3d 749, 753.) The reason for the lack of such an objection is clear. There was no ground for it. The taking of a defendant's handwriting exemplar does not violate his Fourth Amendment rights. (*United States v. Dionisio,* 410 U.S. 1, 14-16.)

(b) That the giving of the exemplar violated his Fifth Amendment rights. No so. (See *Gilbert v. California,* 388 U.S. 263, 266-267.) Meier was not asked to incriminate himself; he was just asked to write the same words as those on the ransom note.

(c) That the handwriting expert improperly gave his opinion that Meier wrote the ransom note. In this respect, Meier complains that the expert improperly used some 1967 handwriting exemplar of Meier for comparison purposes. Mrs. Evans identified the 1967 writings. The court kept them out not because they

were not Meier's handwriting but because they contained extraneous matter. The court properly ruled that the expert could use them for comparison purposes. A proper foundation was established.

(16) Montoya complains of the use of a composite report of the sheriff's office to refresh the recollection of the officers.

With all due respect to appellate counsel who have done a magnificent job with the material at hand, this contention reaches a little far. There is nothing wrong with a composite report. It was available to counsel (Evidence Code, § 771.) The officer prepared it on the day after the incident and vouched for its accuracy. (Evidence Code, § 1231.) There was nothing improper in the use of this report to refresh recollections.

(17) Meier complains of error in the admission of hearsay evidence.

The incidents are as follows:

(a) No objection was made to testimony of a deputy that he had been told of certain phone calls.

(b) The fact that one deputy said another deputy said that Mrs. Ponce had received a call was not hearsay, was not admitted for the truth of the matter contained therein but merely established the fact of the call.

(c) The district attorney made his offer of proof. The defendant objected and the court sustained the objection. Meier now complains that the jury heard the offer. Of course, they did. However, they were instructed not to consider any such statement by counsel and we assume they were intelligent enough to follow the instruction.

(d) An officer testified that he heard a radio communication and heard the telephone ring. Again, this was not hearsay. He was testifying as to what his senses perceived.

(e) Another attempt by the prosecution to introduce hearsay was withdrawn.

Thus, Meier's complaints about the admission of hearsay evidence are without basis.

(18) All defendants complain of a failure of the court in one case to admonish the jury in the language of Penal Code, § 1122.

The judge religiously gave the usual Penal Code, § 1122 admonition at recesses. However, after the district attorney's opening argument in an effort to reimpress the jurors with their duty not to talk to anyone, read the papers, etc., he noted that they could be thinking about things at that time. This observation by the court merely faces up to a fact of life. Of course, the jurors had started the thought processes which would eventually lead to a decision. A recognition of this simple fact is not prejudicial error. The attitude of attorneys in demeaning the integrity and intelligence of the jury is a matter concerning which this court has expressed itself previously. (See *People v. Long*, 38 Cal.App. 3d 680, 689.)

(19) Walters complains (see contention 5 above) that the district attorney suppressed evidence by withholding the receipt which showed that Walters had reasons to be in the area of the pickup that day by reason of a retail store receipt.

There is nothing to indicate that the receipt was withheld. It was obviously turned over to Walters' attorney and used by him during his examination of the witness. The district attorney had no occasion to use it before.

(20) Walters complains of prosecutorial misconduct.

On pages 120-126 of his brief, he lists incidents of alleged prosecutorial misconduct. With one exception, to which an objection was made, the objection sustained and the jury admonished, the comments are perfectly proper comments on the evidence. Understandably, trial counsel did not object. There was no basis for an objection. The comments made contained no charges of fabrication of a defense, merely a legitimate argument that the defense was trying to mislead the jury from the trial facts. To one comment about the jury not to be misled into sympathy for the defendants because of the security measures in the courtroom, an objection was made, the jury was admonished and, again, it is assumed that they followed the admonition. That one incident standing by itself is certainly no cause for reversal.

(21) Walters contends that the court should have granted his motion for acquittal (Penal Code, § 1118.1) on the kidnaping charge. Since this is not an appealable order, we review the matter as an appeal from the judgment.

We approach this matter in the light of established principles of appellate review. Based upon these standards, the evidence is that Meier and Montoya were seen in a white Chrysler on the 14th. On October 15, Walters picked up the payoff money. He was driving a white Chrysler. He looked at the basket, walked around watching the area, picked up the bag of money, checked its contents, put the money in

the white Chrysler and drove off. He had in his possession a map in which that particular area was circled. A reasonable inference can also be drawn that Meier and Montoya saw Walters make the pickup because at that time Montoya signalled Meier and they left the area. In this record, there is substantial evidence that Walters was part of a ransom plot although not necessarily involved in the murder.

(22) Montoya complains that the count of kidnaping John McGrail will not hold up because John McGrail was not being held for ransom.

While it is true that McGrail was a completely innocent victim and kidnaped and murdered only because he happened to be at the Sanchez home, he and the other three were kidnaped as a group with the intent of detaining the whole group for the purpose of ransom. All four victims were kidnaped for that purpose. Montoya cannot escape responsibility simply because McGrail was not mentioned in the ransom efforts. The necessary intent had been established at the time the four people were seized for the purpose of ransom.

(23) Walters complains because the judge did not grant his request for a continuance to investigate possible misconduct by a juror.

A juror apparently called in to see if the trial was still going on having heard from a radio broadcast that it was over. Counsel wanted the court to continue the case to ascertain whether the juror had violated the court's order not to listen to the radio. Such matters are left to the discretion of the trial court. The incident occurred just before final argument. The court may have thought that an interview with the

juror would only point up the incident to the juror and to the rest of the jury. No adequate showing was made of a need for a continuance and there was no abuse of discretion in denying it.

(24) When the court read the proposed verdicts, it started with the guilty verdicts and ended with the not guilty verdicts, a rather common practice. Meier now contends that this in some way impairs his presumption of innocence.

The contention is frivolous. There is absolutely no reason to believe that any juror is going to be influenced by the order in which the verdicts are given.

(25) All three defendants contend that the court should have given their proffered instruction that seizing and carrying away a dead body is not one of the crimes delineated in Penal Code, § 209.

Only the defendants know who was killed in the house and who was killed in the mountains. It is clear that some were alive when they left the house, probably the vomiting children. Mrs. Sanchez and John McGrail were probably killed in the house. There is no question as to the counts involving the two children who were alive and taken from the house.

An interesting theoretical question could be discussed as to whether Penal Code, § 209 is violated by moving a dead body. However, that question is not applicable here. The kidnaping occurred when the four victims were seized in Mrs. Sanchez' home. At that time all four were alive. The fact that two were probably killed there becomes immaterial and the court properly refused to instruct that a dead body may not be kidnaped.

Defendants' argument re incidental movement with substantial increased risk of harm to the victim (*People v. Daniels*, 71 Cal. 2d 1119) is misplaced. This rationale only refers to kidnaping for robbery. This was pure kidnaping for ransom. Any seizure of a victim for ransom is sufficient under Penal Code, § 209. The victim need not be moved a foot or an inch. The kidnaper may move in, seize the victim, call for his ransom and the crime is complete. Penal Code, § 209, says "seize, confine" insofar as pure kidnaping is concerned. However, for kidnaping for robbery, the defendant must carry away the victim. (*People v. Macinnes*, 30 Cal.App. 3d 838.) Under these circumstances, there must be substantial movement otherwise it is only robbery under the *Daniels*' rationale.

However, here live victims were seized. That is enough. Just when and where they were killed becomes immaterial as to these counts—except as to the victims.

(26) Walters contends that the court should have instructed on second degree murder.

Although he was found not guilty of murder, Walters now submits the rather novel theory that the jury should have been instructed on second degree felony murder under which they might have found him guilty of that offense rather than kidnaping.

The logic escapes us. Walters was not prejudiced by any alleged failure to instruct on second degree murder. The jury was instructed on second degree murder—malicious murder but not felony murder. However, since Walters was acquitted of murder, he has nothing to complain about and under any circumstances

the prosecution did not proceed under any felony murder theory and the defense presented none.

(27) Walters also complains because the court did not *sua sponte* instruct on the lesser included offense of extortion.

Extortion is not a lesser included offense to the crime charged. A lesser included offense is an offense which is always committed when the greater offense is committed. Extortion is not a lesser included offense of kidnaping for ransom since it is possible to kidnap someone for ransom without having completed the crime of extortion. Extortion is completed only when money is obtained from the victim. (Penal Code, § 518.) Kidnaping is completed when the victim is seized with the intent to obtain ransom. Here there is no evidence of extortion. There was only kidnaping for ransom. The defendants deny any involvement. If they had wished to develop some esoteric concept of extortion from the circumstances of this case, they should have presented a suggested instruction to that effect with supporting authorities. "The judge need not fill in every time a litigant or his counsel fails to discover an abstruse but possible theory of the facts." (*People v. Wade*, 53 Cal. 2d 322, 334.)

(28) Walters contends that the court should have instructed *sua sponte* that the jury could not convict him of kidnaping if they believed he did not become part of the kidnaping plot until after the victims had been killed.

Again, we become involved with the principles of *Wade, supra*. The court properly instructed as to the general principles of law relevant to the issues raised by the evidence. The theory now advanced reflects

a specific or unique theory of defense. The People's case and the People's theory were that the defendants were involved in kidnaping from the moment of the seizure, *i.e.*, the inception of the kidnaping plot. Defendants deny anything to do with the kidnaping. The suggested instruction might well be subject to attack as having been potentially prejudicial to the defendants if inconsistent with their theory of defense, *i.e.*, non-involvement. (See *People v. Sedeno*, 10 Cal. 2d 703, 715-716.)

(29) Walters contends the kidnaping counts cannot stand because of his acquittal on the murder counts.

The elements of the crimes are in no way identical. The jury could well have concluded that while Walters was involved in the kidnaping, he had nothing to do with the murders. He may even have been opposed to the murders. The victims did not know him and he had less reason to become involved in the killings than the other defendants. He may have driven from the house before the killings took place (another car drove off before the neighbors heard the screaming). There were ample opportunities for the jury to draw reasonable inferences which would absolve Walters of murder or, at least, raise a reasonable doubt as to the murders without absolving him of the kidnaping charges or becoming involved in any inconsistent verdicts.

(30) Walters contends that the imposition of a life sentence without possibility of parole is cruel and unusual punishment.

This contention is squarely answered in *In re Maston*, 33 Cal.App.3d 559 [hearing denied]. In that case,

Mr. Justice Friedman, obviously not enamored of the penalty aspect of Penal Code, § 209, nevertheless upheld it against constitutional attack. As noted, the Supreme Court denied a hearing.

We have no hesitation in upholding the punishment aspects of Penal Code § 209, as being constitutional.

Under *In re Lynch*, 8 Cal. 3d 410, and *In re Foss*, 10 Cal.3d 910, the Supreme Court held that the punishment aspect of a criminal statute is cruel and unusual if it "shocks the conscience and offends fundamental notions of human dignity." (*Lynch, supra*, at p. 424.)[2]

Lynch establishes three tests for unconstitutionality:

(a) The nature of the offense and the offender.

As Mr. Justice Friedman said in *Maston, supra*, "Kidnapings are coldly planned, deliberate schemes." (at p. 563.) The purpose of the section is to encourage the kidnaper to release the victim unharmed. The fact that this theory did not work out in this particular case is of no moment. The offense of kidnaping for ransom which involves bodily harm is more of an attack on civilized standards of decency and the dignity and sanctity of the individual human being than the average murder case which is usually the result of some kind of an emotional explosion. The nature of this particular crime renders it close to, if not at the top of, any list of heinous crimes.

As to the offenders, it is difficult to conceive of a more brutual, sadistic set of circumstances than that

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[2]The rationale of *People v. Wingo*, 14 Cal. 3d 169, is obviously not applicable to a sentence under Penal Code, § 209.

outlined in this case. As indicated, the defendants (possibly excepting Walters) knew from the beginning that they were going to kill the victims. Then when they did so, they did so in an almost unspeakably savage way. Thereafter, they tried to secure a ransom from anguished relatives. The prepetrators of the crimes in this case are obviously deserving of the utmost in criminal sanctions.

(b) A comparison with other crimes in the state.

Since *Maston*, the death penalty has been reinstituted in this state, its future uncertain at the hands of either the Supreme Court of this state or the Supreme Court of the United States. Therefore, the rationale of *Maston*, which we need not repeat (*Maston, supra*, at pp. 564-565) which approves this penalty is now buttressed by the existence of the death penalty for certain kinds of murder. Should the new death penalty be outlawed, we subscribe to the rationale of *Maston* in its comparison with other crimes in this state.

(c) A comparison with the same crimes in other states.

While this type of comparison might better be left to a legislative committee studying penalties than a judicial determination, it exists under *Lynch*. The Attorney General and counsel for Walters have furnished the court with a list of similar punishment for similar offenses in other states. From this list, we gather that no state considers kidnaping for ransom with bodily injury a laughing matter. Several states have life without possibility of parole. Other states still have the death penalty. Even those which do have parole hedge it with minimums of ten, twenty or twenty-five years in prison.

Walters contends that *Maston's* "underlying premises" have since been contradicted by *Foss*. We have reviewed *Maston* in light of *Foss* and find that in no way have *Maston's* "underlying premises" been contradicted by the later case. As a matter of passing interest, *Maston* came down in July 1973, *Foss* in March 1974. If *Maston* was as completely out of line as Walters contends, it is odd that the Supreme Court did not make some note of such a grossly erroneous holding when it filed its opinion in *Foss*. Until the Supreme Court rules to the contrary, we choose to follow the very excellent analysis of this problem set forth in *Maston*.

Walters also attempts to have this court declare the statute unconstitutional insofar as it applies to him personally. In so doing, he rather dramatically throws Meier and Montoya to the wolves. It is true that Meier and Montoya were convicted of the murder and Walters was not. We have discussed this issue and the reconciliation of these verdicts. However, in this context, we would merely point out that Walters was convicted of the kidnaping charge, that he was a vital part of the whole transaction and that a reasonable inference can be drawn that he was with Meier and Montoya the day before, as well as taking part in the transactions the day after the murder. While the jury may have had a reasonable doubt as to Walters' actual complicity in the murder itself, this record does not reflect that Walters was without knowledge of the entire plot. We decline to find Penal Code, § 209, unconstitutional as applied to Walters.

All in all, considering the nature of the offense and the offenders, a comparison with other statutes

in this state and the same statutes in other states, we do not find that the punishment in this case either shocks the conscience or offends fundamental notions of human dignity.

(31) Meier and Montoya complain that the judge would not let them have "continuing objections." Whether or not to allow a continuing objection is a matter peculiarly within the discretion of the trial court. A continuing objection has its place as an efficient tool when one objection on a particular ground goes to all of the rest of the evidence. Whether or not to allow such an objection is left entirely to the discretion of the court. A continuing objection was not proper in the instant case. It would have been awkward to allow a continuing objection and the trial court was quite proper in insisting that counsel articulate their objections as evidentiary matters developed.

(32) Counsel for Meier and Montoya have presented additional so-called issues at the request of their clients. Montoya lists 32 such contentions. Meier lists 55. These so-called issues are simply not arguable under *People v. Feggans*, 67 Cal. 2d 444, 447. Examples are as follows:

"Martha Evans committed perjury. . . ."

"It is a fact that the attorneys were threatened by phone and that their houses were stoned and I feel that this is one of the reasons that I did not get a fair trial."

"The presiding judge was in an election campaign; he was not an impartial judge, he was biased."

"It is a proven fact that at least three police officers lied on the stand. Why?"

"I feel the jury was tampered with and they did not follow the admonition of the court."

"It is a fact that McGrail, a victim, embezzled $2,000 and that was never brought out at the trial. Why? There could be the motive."

"What happened to the $2,000 McGrail stole?"

"This case has the same method of operation as the random killings by the Death Angels. It should be checked."

Counsel have presented and argued vigorously all issues which they consider arguable. If, in their professional opinion, they do not consider the type of issues set forth above arguable, they need not prostitute themselves by arguing them. (*People v. Eckstrom*, 43 Cal. App. 3d 996.) We have considered each of these so-called contentions and found each of them to be without merit.

The defendants received a fair trial from an impartial, unbiased and dispassionate judge who saw to it that their rights were meticulously protected. They were represented by able and experienced trial counsel who afforded them excellent representation. The district attorney tried the case carefully and was not guilty of any acts of misconduct which affected the rights of the defendants to a fair trial. A carefully selected jury, after hearing all of the evidence and being properly instructed on the law, found the defendants guilty. These defendants had a fair trial in the most literal sense of the word.

On appeal, each defendant has been represented by private counsel. Each counsel has searched the record carefully and presented to this court each and

every issue he considered reasonably arguable. The briefing and research in this case have been outstanding. Appellate counsel have given unstintingly of their time, knowledge and expertise in representing these defendants.

This court has carefully considered each of the issues raised and has concluded that the judgment of the trial court is to be affirmed.

Judgment affirmed.

Not to be Published in Official Reports

/s/ Gardner, *P. J.*

We concur:

/s/ Kaufman, *J.*

/s/ McDaniel, *J.*

EXHIBIT C.

Court of Appeal—State of California, Fourth Appellate District, Division Two.

People, Respondent vs. Norbert Deiter Meier, et al., Appellants. 4 Crim. No. 6474. County No. CR-29660.

Filed: July 31, 1975.

BY THE COURT:

The petitions for rehearing by counsel for appellants Montoya and Walters are each denied.

Gardner, *P. J.*

Copies to: County Clerk, County of San Bernardino, Courthouse, 92401; Atty. Gen., San Diego, 92101; Dist. Atty., Courthouse, Rm. 200, San Bernardino, 92401; Howard B. Weitzman, 8383 Wilshire Blvd., Ste. 540, Beverly Hills, 90211; Robert M. Castle, P.O. Box 306, E. State St., Redlands, 92373.

EXHIBIT D.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

September 4, 1975

I have this day filed Order Hearing Denied.

In re: 4 Crim. No. 6474. People vs. Meier, et al.

Respectfully,

G. E. BISHEL
Clerk

EXHIBIT E.

Remittitur.

In the Court of Appeal, Fourth Appellate District, State of California, Division Two.

People, etc., Plaintiff and Respondent vs. Norbert Deiter Meier, Edward Joseph Montoya, and Phillip Elwon Walters, Defendants and Appellants. 4 Crim. No. 6474. Superior Court No. CR-29660 County of San Bernardino.

Filed: September 9, 1975.

I, ERVIN J. TUSZYNSKI, Clerk of the Court of Appeal, Fourth Appellate District, State of California, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on July 9, 1975 and this opinion or decision has now become final.

Witness my hand and seal of the Court this 8th day of September, 1975.

Ervin J. Tuszynski, Clerk.
By /s/ Jay W. Tyrrel
Jay W. Tyrrel, Deputy

EXHIBIT F.

Notice of Appeal to the United States Supreme Court, 28 U.S.C. §1257(2): Rule 10 of Rules of Supreme Court of the United States.

Court of Appeal of the State of California, Fourth Appellate District, Division Two.

The People of the State of California, Plaintiff/Respondent vs. Phillip Elwon Walters, Defendant/Appellant.

U.S. S. Court #(undocketed)

Cases below:

DCA #4 Crim. 6474

Superior Ct. #CR 9660

TO: THE CLERK OF THE ABOVE ENTITLED COURT AND TO THE PEOPLE OF THE STATE OF CALIFORNIA AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that the Defendant and Appellant PHILLIP ELWON WALTERS hereby appeals from the Opinion and Judgment of this Court affirming his conviction on four counts of kidnapping with bodily injury in violation of Penal Code §209 entered against him in the Superior Court of San Bernardino County and from the Order of said Court imposing a Sentence of Life Imprisonment Without Possibility of Parole upon him on April 16, 1974. [See Exhibit A attached]

Said Judgment and Order were affirmed by this Court on July 9, 1975 [Exhibit B] and a Petition for Rehearing was denied by this Court on July 31, 1975. [Exhibit C]

A Petition for Hearing was denied by the California Supreme Court on September 4, 1975. [Exhibit D]

A Remittitur was filed in this Court on September 9, 1975. [Exhibit E]

This appeal is taken, *inter alia* on the following grounds, without intent to enumerate all of the contentions and issues raised on appeal:

1. That California Penal Code §209, which imposes a mandatory sentence of life imprisonment without possibility of parole on *all* those convicted of kidnapping with bodily injury without regard to the degree of the injury or to the particular offender's degree of involvement in the offense, his age, prior record, or any other factor, is repugnant to the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution as applied to the states through the Due Process Clause of the Fourteenth Amendment.

2. That the California Statutory Scheme which commits those convicted of kidnapping with bodily injury to life imprisonment without possibility of parole while allowing parole to convicted murders, rapists and all other serious offenders is repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. That California Penal Code §939, which, as construed by the California Courts, denies an accused person the right to counsel in Grand Jury Proceedings

where an accused person prosecuted by way of Preliminary Hearing has a right to counsel is repugnant to both the Sixth Amendment to the United States Constitution as applied to the states through the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

4. That Appellant was denied Due Process of Law due to a combination of the following factors:

(a) the trial court denied Appellant's change of venue motion, thus forcing him to stand trial in a county inundated with hostility against him as a result of widespread adverse publicity, and in a courtroom so permeated with hostility that the defendants had to be protected by bullet proof glass from murderous assaults by members of the audience.

(b) the trial court denied Appellant's motion to sever defendants for trial, thus forcing him to stand trial with co-defendants whom the facts demonstrated beyond a shadow of a doubt, were the direct perpetrators of the kidnapping and murders whereas Appellant's only alleged involvement, proved *solely* by the weakest kind of circumstantial evidence, was that he picked up the ransom money and Appellant thus suffered from prejudicial association with his co-defendants in the minds of the jurors.

(c) the Appellant was dragged before the jury in chains amidst an army of armed guards, thus prejudicing the jury.

(d) armed guards were present at the counsel table and prevented Appellant from conferring with his counsel during the trial and

(e) the trial judge informed the jury they could form their opinion of the case *before* hearing defense counsel's argument.

Notices of this Appeal have also been filed in the Superior Court of San Bernardino County and in the California Supreme Court.

DATED: 11-13-75.

Respectfully submitted,

/s/ Howard L. Weitzman,
HOWARD L. WEITZMAN,
Attorney for Appellant
Phillip Elwon Walters

EXHIBIT G.

Notice of Appeal to the United States Supreme Court, 28 U.S.C. §1257(2): Rule 10 of Rules of Supreme Court of the United States.

Superior Court of the State of California, for the County of San Bernardino.

The People of the State of California, Plaintiff/Respondent vs. Phillip Elwon Walters, Defendant/Appellant.

U.S. S. Court #(undocketed)

Cases below:

DCA #4 Crim. 6474
Superior Ct. #CR 9660

TO: THE CLERK OF THE ABOVE ENTITLED COURT AND TO THE PEOPLE OF THE STATE OF CALIFORNIA AND THEIR ATTORNEYS:

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Said Judgment and Order were affirmed by the Court of Appeal, Fourth Appellate District on July 9, 1975 [Exhibit B] and a Petition For Rehearing was denied by the Court of Appeal on July 31, 1975. [Exhibit C].

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2. That the California Statutory Scheme which commits those convicted of kidnapping with bodily injury to life imprisonment without possibility of parole while allowing parole to convicted murders, rapists and all other serious offenders is repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. That California Penal Code §939, which, as construed by the California Courts, denies an accused person the right to counsel in Grand Jury Proceedings where an accused person prosecuted by way of Preliminary Hearing has a right to counsel is repugnant to both the Sixth Amendment to the United States Constitution as applied to the states through the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

4. That Appellant was denied Due Process of Law due to a combination of the following factors:

(a) the trial court denied Appellant's change of venue motion, thus forcing him to stand trial in a

county inundated with hostility against him as a result of widespread adverse publicity, and in a courtroom so permeated with hostility that the defendants had to be protected by bullet proof glass from murderous assaults by members of the audience.

(b) the trial court denied Appellant's motion to sever defendants for trial, thus forcing him to stand trial with co-defendants whom the facts demonstrated beyond a shadow of a doubt, were the direct perpetrators of the kidnapping and murders whereas Appellant's only alleged involvement, proved *solely* by the weakest kind of circumstantial evidence, was that he picked up the ransom money and Appellant thus suffered from prejudicial association with his co-defendants in the minds of the jurors.

(c) the Appellant was dragged before the jury in chains amidst an army of armed guards, thus prejudicing the jury.

(d) armed guards were present at the counsel table and prevented Appellant from conferring with his counsel during the trial and

(e) the trial judge informed the jury they could form their opinion of the case *before* hearing defense counsel's argument.

Notices of this Appeal have also been filed in the Court of Appeal and in the California Supreme Court.

DATED: 11-13-75.

Respectfully submitted,

/s/ Howard L. Weitzman
HOWARD L. WEITZMAN
Attorney for Appellant
Phillip Elwon Walters

EXHIBIT H.

Notice of Appeal to the United States Supreme Court, 28 U.S.C. §1257(2): Rule 10 of Rules of Supreme Court of the United States.

Supreme Court of the State of California.

The People of the State of California, Plaintiff/Respondent, vs. Phillip Elwon Walters, Defendant/Appellant.

U.S. S. Court #(undocketed)

Cases below:
DCA #4 Crim. 6474
Superior Ct. #CR 9660

TO: THE CLERK OF THE ABOVE ENTITLED COURT AND TO THE PEOPLE OF THE STATE OF CALIFORNIA AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that the Defendant and Appellant PHILLIP ELWON WALTERS hereby appeals from the refusal of this Court to review and reverse the judgment of conviction on four counts of kidnapping with bodily injury in violation of Penal Code §209 entered against him in the Superior Court of San Bernardino County and from the Order of that Court imposing a Sentence of Life Imprisonment Without Possibility of Parole upon him on April 16, 1974. [See Exhibit A attached]

Said Judgment and Order were affirmed by the Court of Appeal, Fourth Appellate District on July 9, 1975 [Exhibit B] and a Petition for Rehearing

was denied by the Court of Appeal on July 31, 1975. [Exhibit C]

A Petition for Hearing was denied by this Honorable Court on September 4, 1975. [Exhibit D].

A Remittitur was filed in the Court of Appeal on September 9, 1975. [Exhibit E]

This appeal is taken, *inter alia* on the following grounds, without intent to enumerate all of the contentions and issues raised on appeal:

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2. That the California Statutory Scheme which commits those convicted of kidnapping with bodily injury to life imprisonment without possibility of parole while allowing parole to convicted murders, rapists and all other serious offenders is repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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person the right to counsel in Grand Jury Proceedings where an accused person prosecuted by way of Preliminary Hearing has a right to counsel is repugnant to both the Sixth Amendment to the United States Constitution as applied to the states through the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

4. That Appellant was denied Due Process of Law due to a combination of the following factors:

(a) The trial court denied Appellant's change of venue motion, thus forcing him to stand trial in a county inundated with hostility against him as a result of widespread adverse publicity, and in a courtroom so permeated with hostility that the defendants had to be protected by bullet proof glass from murderous assaults by members of the audience.

(b) the trial court denied Appellant's motion to sever defendants for trial, thus forcing him to stand trial with co-defendants whom the facts demonstrated, beyond a shadow of a doubt, were the direct perpetrators of the kidnapping and murders whereas Appellant's only alleged involvement, proved *solely* by the weakest kind of circumstantial evidence, was that he picked up the ransom money and Appellant thus suffered from prejudicial association with his co-defendants in the minds of the jurors.

(c) the appellant was dragged before the jury in chains amidst an army of armed guards, thus prejudicing the jury.

(d) armed guards were present at the counsel table and prevented Appellant from conferring with his counsel during the trial and

(e) the trial judge informed the jury they could form their opinion of the case *before* hearing defense counsel's argument.

Notices of this Appeal have also been filed in the Court of Appeal and in the Superior Court of San Bernardino County.

DATED: 11-13-75

Respectfully submitted,

/s/ Howard L. Weitzman
HOWARD L. WEITZMAN
Attorney for Appellant
Phillip Elwon Walters

EXHIBIT I.

PROOF OF SERVICE BY MAIL

State of California, County of San Bernardino—ss.

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 8383 Wilshire Blvd., Suite 540, Beverly Hills, CA 90211.

On November 14, 1975, I served the within Notices of Appeal to the United States Supreme Court 28 U.S.C. §1257(2): Rule 10 of Rules of Supreme Court of the United States on the Appellee in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California addressed as follows:

Attorney General, State of California, Appellate Division, 1350 Front St., San Diego, Calif. 92101. Attn: Dep. A.G. Jay Bloome, District Attorney, Appellate Division, 362 Arrowhead Ave., San Bernardino, California 92415. Attn: Dep. D.A. John Arden, County Clerk of San Bernardino County Superior Court, 362 Arrowhead Avenue, San Bernardino, Calif. 92415

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 14, 1975 at Beverly Hills, California.

/s/ Lolita J. Metz
LOLITA J. METZ

EXHIBIT J.

Order.

Supreme Court of the United States

No. A-462

Phillip Elwon Walters, Appellant v. California.

UPON CONSIDERATION of the application of counsel for appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including December 31, 1975.

/s/ William H. Rehnquist
Associate Justice of the Supreme Court
of the United States

Dated this 18th day of November, 1975.

EXHIBIT K.

Comparison of Crimes and Punishments in California Penal Code.

CRIME	PENALTY	PENAL CODE SECTION
CRIMES INVOLVING BODILY INJURY AS AN INHERENT ELEMENT OF THE OFFENSE:		
Infliction of traumatic injury on wife or child	1-10 yrs.	273d
Illegal abortion	2-5 yrs.	274
Sexual assaults on children	1 yr.-life with possibility of parole	287
CRIMES OTHER THAN KIDNAPPING OFFENSES PROVIDING INCREASED PENALTIES FOR BODILY INJURY:		
Robbery with bodily harm	15-life	213
Train wrecking with bodily harm	life without possibility of parole	219
Rape with bodily injury	15-life with possibility of parole	264
Wilful cruelty to children with bodily injury	1-10 yrs.	273a
Sex perversion with threat of bodily harm	3-life	288
Burglary with bodily harm	15-life with possibility of parole	461

CRIME	PENALTY	PENAL CODE SECTION
CRIMES INVOLVING BODILY INJURY AS AN INHERENT ELEMENT OF THE OFFENSE:		
1st Degree Murder [absent special circumstances]	Life with possibility of parole	190
2nd Degree Murder	5-life	190
Manslaughter	0-15 yrs.	193
Mayhem	0-14 yrs.	204
Robbery—1st Degree	5-life with possibility of parole	213
Robbery—2nd Degree	1-life with possibility of parole	213
Attempted Murder	10-life	216
Assault with intent to murder	1-14 yrs.	217
Acts with intent to train wreck	Life without possibility of parole	219
Assault with intent to rape	1-20 yrs.	220
Assault with intent to commit felony other than murder or rape	1-15 yrs. or may be treated as misdemeanor at Court's discretion	221
Assault on peace officer	1-2 yrs.	241
Battery on peace officer	1-10 yrs.	243
Assault with caustic chemicals	1-14 yrs.	244
Assault with deadly weapon	6 mo.-life with possibility of parole	245a
Rape	3 yrs.-life with possibility of parole	264

EXHIBIT L.

Penalties for Kidnapping Offenses Compared by Jurisdictions.

Jurisdiction	*Source*	*Degree*	*Penalty*
Alabama	Recompiled Code, Title 14, Sec. 6, (Revised 1973)	1) Simple 2) For ransom	2-10 yrs. death or 5-life at discretion of Judge
Alaska	Sec. 11.15.260 Alaska Code	1) Simple	term of yrs. up to and including life imprisonment with possibility of parole
Arizona	Revised statutes annotated (1974) Secs. 13-491, 13-492	1) Simple 2) With extortion, robbery, rape, sodomy, or lewd or lascivious conduct without bodily harm 3) Same aggravated offenses resulting in bodily harm	1-10 yrs. 25-50 yrs. life without possibility of parole
Arkansas	Statutes annotated (1971) Title 41-2309	1) Simple 2) With bodily harm	1-3 yrs. 1-20 yrs.
Colorado	Revised statutes 40-2-45 (1963)	1) Simple 2) With bodily harm	30 yrs. to life with possibility of parole Life with possibility of parole or death

Jurisdiction	*Source*	*Degree*	*Penalty*
Connecticut	General Statutes annotated (Amended 1973) Secs. 532, et seq.	1) Simple 2) Aggravated (Including ransom, bodily harm, sexual abuse, terrorizing the victim, or interfering with performing a government function)	Term of yrs. Life in prison with possibility of parole
Delaware	Code Annotated Title 11, Sec. 623	1) Simple 2) Kidnapping child	Life with possibility of parole Life with possibility of parole
District of Columbia	Code Section 22-21010 (1973)	1) Simple	Life imprisonment with possibility of parole or term of yrs.
Florida	Statutes Annotated 805.01 805.02 (Amended 1972)	1) Simple 2) For ransom	1-10 yrs. Life with possibility of parole
Georgia	Code Annotated (1974) Sec. 26-1312	1) Simple 2) Ransom or with bodily harm	1-20 yrs. Life with possibility of parole or death
Hawaii	Revised statutes Sec. 749-1 (1973)	1) Simple	Life with possibility of parole or term of yrs. plus $1,000 fine

Jurisdiction	*Source*	*Degree*	*Penalty*
Idaho	Code, Section 18-4504 (1974)	1) Simple	1-25 yrs.
		2) 1st Degree	Life with possibility of parole
		3) 1st Degree resulting in bodily harm	Life with possibility of parole or death
Illinois	Smith-Hurd, Illinois Annotated Statutes Title 38, Sec. 10-1	1) Simple	1-5 yrs.
	Section 10-2	2) Aggravated	2 yrs. to life with possibility of parole
		3) Aggravated with ransom	Life with possibility of parole or death at jury's discretion
		4) Aggravated but not for ransom involving either a) bodily harm or b) children	2 yrs. to life
Indiana	Burns Indiana Statutes Annotated Sec. 2901	1) Simple	Life with possibility of parole
	10-2902	2) Kidnapping children	2-14 yrs.
	10-2903	3) For ransom	Death or life with possibility of parole

Jurisdiction	*Source*	*Degree*	*Penalty*
Iowa	Annotated Code Criminal Provisions 706.1-706.2 706.3	1) Simple	1-5 yrs. plus $1,000 fine
		2) Kidnapping children	1 yr. plus $1,000 fine
		3) Ransom	Life at hard labor with possibility of parole
Kansas	General Statutes 1949-21-449	1) 2nd Degree	20-life
		2) 1st Degree	Life with possibility of parole
Kentucky	Revised Statutes (1974) 509.040	1) Simple	10-20 yrs.
		2) With bodily harm	Death
Louisiana	Revised Statutes (1974) 14:44	1) Aggravated	Life with possibility of parole
		2) With bodily harm	Death
Maine	Revised Statutes Annotated 2051	1) Simple	Life with possibility of parole
Maryland	Annotated Code Article 27, Sec. 337	1) Simple	1-30 yrs. or death if special circumstances are involved
		2) Involving children	Same
Massachusetts	Annotated Laws Chapter 265, Section 26	1) Simple	10 yrs. or 2 yrs. plus $1,000 fine
		2) For ransom	1-life with possibility of parole

Jurisdiction	*Source*	*Degree*	*Penalty*
Michigan	Statutes Annotated 28.581	1) Simple	Life or term of yrs.
	28.582	2) Of children	Same
Minnesota	Statutes Annotated 609.25	1) Simple	1-20 yrs. plus fine up to $20,000.00
		2) Involving bodily harm	1-40 yrs. and up to $40,000.00 fine
Mississippi	Code Annotated Section 2237	1) Simple	1-10 yrs.
	Section 2238	2) Kidnapping children	Death
		3) Aggravated kidnapping	1-30 yrs. or life with possibility of parole
Missouri	Revised Statutes 559.230	1) For ransom or in return for performing specific act	5 yrs. to life with possibility of parole or death
	Revised Statutes 559.240	2) Other	1-10 yrs.
Montana	Revised Criminal Code 1973 Section 94-2601	1) Simple	5 yrs. to life
	Section 94-2602	2) Aggravated	Life with possibility of parole or death
Nebraska	Revised Statutes 28-417	1) Simple	Life with possibility of parole
		2) Bodily injury	Life or death

Jurisdiction	*Source*	*Degree*	*Penalty*
Nevada	Revised Statutes 200.320	1) Simple	1-15 yrs.
		2) 1st Degree	Death or life without possibility of parole or life with possibility of parole if jury so recommends
New Hampshire	Revised Statutes Annotated 585.19	1) Simple	1-25 yrs.
		2) Of children	15-40 yrs.
New Jersey	Statutes Annotated 2A:118-1	1) Simple	30 yrs. to life with possibility of parole
		2) For ransom	Life with possibility of parole or death
New Mexico	Statutes 40A-4-1	1) Simple	Term of yrs.
		2) With bodily injury	Death
New York	Revised Statutes 135.25	1) 1st Degree	15-25 yrs. or life with possibility of parole
	135.20	2) 2nd Degree	8⅓ to 25 yrs.
North Carolina	General Statutes Section 14-39	1) Simple	Life with possibility of parole
	14-41	2) Of children	1-15 yrs.
North Dakota	Century Code 12-42-01	1) Simple	5-20 yrs.
Ohio	Baldwin's Revised Code Annotated Chapter 2905	1) Simple	Life?
		2) Simple with bodily injury	Same?

Jurisdiction	*Source*	*Degree*	*Penalty*
Oklahoma	Statutes Annotated Title 21, Sec. 745	1) Simple	10-life or death with special circumstances
Oregon	Revised Statutes 163.225	1) 2nd Degree	1-10 yrs.
	163.2235	2) 1st Degree	1-20 yrs.
	161.605	Classes of felonies and punishments defined.	
Pennsylvania	Purdon's Consolidated Pennsylvania Statutes Annotated 2901, 1103	1) Simple	1-20 yrs.
Puerto Rico	Laws Annotated Title 33, Sec. 701-703	1) Simple	1-10 yrs.
South Carolina	Code of Laws (1966) Section 16-92	1) Simple	Life with possibility of parole
	16-91	2) With bodily injury	Death
South Dakota	Compiled Laws (1957) 22-19	1) Simple	Life with possibility of parole
		2) With bodily injury	Death or life with possibility of parole at mercy of the jury
Tennessee	Code Annotated 2601	1) Simple	2-10 yrs.
	2602	2) Of children	1-5 yrs.
	2603	3) For ransom	20 yrs. without possibility of parole

Jurisdiction	*Source*	*Degree*	*Penalty*
Texas	Vernon's Texas Codes Annotated Penal Code Sec. 20.03	1) 3rd Degree	2-10 yrs.
	20.04	2) Aggravated 2nd Degree	2-20 yrs.
	20.04	3) Aggravated with bodily injury	5-99 yrs. or life with possibility of parole
	See Penal Code 12.32 et. seq. for definitions of degrees of felonies and punishments.		
Utah	Code Annotated 76-35-1	1) Second	1-life with possibility of parole
		2) First	Life with possibility of parole or death
Vermont	Statutes Annotated 2401	1) Simple	1-25 yrs. and up to $10,000 fine
	2403	2) With intent to extort money	Death or life with possibility of parole
Washington	Revised Code (1971 Supplement) 9.52.0110	1) 1st Degree	Death or life with possibility of parole
		2) 2nd Degree	Term of yrs. or life with possibility of parole

Jurisdiction	*Source*	*Degree*	*Penalty*
West Virginia	Code Section 61-2-14a-d	1) Simple	Life without possibility of parole under Section (a) unless jury recommends mercy
Wisconsin	West's Wisconsin Statutes Annotated 940.31	1) Simple 2) Ransom 3) Ransom with bodily injury	1-15 yrs. 1-30 yrs. Life without possibility of parole
Wyoming	Statutes Section 6-59	1) Simple 2) With bodily injury	1-20 yrs. Death
Virginia	Code Section 18.1-36 et seq. 18-1-38	1) Simple 2) Of female for immoral purposes or for ransom	1-20 yrs. 3 yrs. to life with possibility of parole or death
Federal	Title 18, Sec. 1201 of the United States Code	1) Simple 2) Bodily harm	Life with possibility of parole or term of years Death

No. 75-926

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM 1975

PHILLIP ELWON WALTERS,

Appellant,

v.

THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-926

PHILLIP ELWON WALTERS;
Appellant,
v.
THE STATE OF CALIFORNIA,
Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves this Court to dismiss the appeal herein for lack of jurisdiction or in the alternative to affirm the judgment of the California Court of Appeal, Fourth Appellate District, Division Two on the ground the questions presented by the appeal are insubstantial and do not warrant further argument.

OPINIONS BELOW

On July 9, 1975, the California Court of Appeal, Fourth Appellate District, Division Two, issued an unpublished opinion in case 4 Crim. 6474 affirming appellant's four convictions for kidnapping for ransom where the victims suffered bodily harm (Penal Code section 209). A copy of this opinion appears as Exhibit B of appellant's brief.

JURISDICTION

Appellant asserts jurisdiction under 28 U.S.C. 1257(2). However, jurisdiction does not lie under this section. (See Argument I, infra.)

STATEMENT OF THE CASE

An indictment returned by the San Bernardino County Grand Jury on October 31, 1973, charged Phillip Walters, Edward Montoya, and Norbert Meier, with four counts of murder (Penal Code section 187) and four counts of kidnapping for purposes of ransom (Penal Code section 209). Each of the four kidnapping counts further alleged each of the four victims had suffered bodily harm. (CT 1-6.)

Thereafter, appellant and the others were arraigned and entered not guilty pleas. (CT 7, 23.)

On November 29, 1973, the court issued a protective order to prevent unfair publicity from prejudicing the defendants' rights. (CT 42-46.) On December 3, 1973, defendants' change of venue motions were denied. (CT 47.) On the same day the court denied defendants' motions for separate trials, and a motion to dismiss by Meier and Montoya. (CT 48.) Although it is unclear from the record, appellant Walters' motion to dismiss apparently was also denied on December 10, 1973. (CT 63.)

After renewed motions for change of venue and separate trials were denied and objections to security procedures were overruled, a jury was selected. (CT 66-94.) Following trial by jury (CT 95-226), Meier and Montoya were found guilty of four counts of first degree murder, and all three defendants

were found guilty of four counts of kidnapping for the purpose of ransom wherein the victims had suffered bodily harm. Appellant Walters was acquitted of the murder charges. (CT 227-233, 312-347.)

On April 10, 1974, defendants were sentenced to state prison for the term prescribed by law and all sentences were to be served concurrently. (CT 360-362, 374-379.)

On July 9, 1975, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed appellant's conviction in an unpublished opinion in case 4 Crim. 6474. (AOB Exh. B.)[1]

On September 4, 1975, the Supreme Court of California denied appellant's request for a hearing. (AOB Exh. C.) He filed Notice of Appeal to this Court on November 13, 1975, asserting jurisdiction pursuant to 28 U.S.C. 1257(2). (AOB Exh. F.)

STATEMENT OF FACTS

1. Prelude

During July of 1973, Martha Evans was in San Bernardino in order to speak to her mother about obtaining a divorce from her husband. Her husband was stationed in the San Bernardino area and owned a green 1969 Plymouth Roadrunner. While in San Bernardino, she met Norbert Meier, and they began dating. About July 15, 1973, she and Meier went to visit Dorothy Sanchez. Mrs. Sanchez was Meier's wife, but both parties were contemplating a divorce. (RT 1541-1557.) On another occasion

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1. AOB refers to appellant's opening brief before this Court.

Meier took Mrs. Evans up to Lake Gregory for a hike and to Lost Lake. On these trips they went in his Plymouth Roadrunner. (RT 1558-1568.)

Sometime after Mrs. Evans returned to her home in Fresno, Meier came up to Fresno to live with her. Around October 7, 1973, Edward Montoya came to Fresno and met Mrs. Evans. (RT 1651-1652, 1571-1574.) On one occasion during the week of October 7, 1973, Meier mentioned he wanted to see his wife during the coming weekend. (RT 1575-1578.) Meier also told Martha he was going to be free of Dorothy Sanchez before Martha would be free of her husband. (RT 1578.)

On Thursday October 11, 1973, Montoya was at the residence of Mrs. Evans, talked about a gun, and mentioned killing someone. He also indicated he was good with knives and talked about being rich some day. (RT 1580, 1583, 1588, 1591, 1673.)

When Mrs. Evans came home from work at 3:30 p.m. on October 12, 1973, she noted her Roadrunner was missing. (RT 1592, 1599-1600.) As she entered her apartment she found someone had ransacked the apartment. (RT 1601.) She also found some paper with defendant Meier's handwriting on it. (RT 1601-1605.) Mrs. Evans further noted some linen, towels, soap, cleaners, gloves, masking tape, and surgical tape had been taken. (RT 1622.) A pair of scissors, a kitchen knife, some razor blades, and three pair of surgical gloves were also missing. (RT 1622-1624, 1628.)

2. <u>The Last Hours of the Victims</u>

On Sunday October 14, 1973, Meier and Montoya were seen at a market in the Crestline area between 4:00 and 5:00 p.m.

(RT 1903-1917.) When they left the store they were seen driving away in a white Chrysler. (RT 1917-1924.)

On October 14, 1973, Mrs. Dorothy Sanchez was living in a house on Grand Terrace Road in Colton with her two children. Toni Sanchez, her daughter, was fifteen, and David Sanchez, her son, was thirteen. (RT 88-103, 146.) On that afternoon, John McGrail, nineteen, a friend of the family, was seen playing baseball with David in the Sanchez yard. (RT 104-105.) A neighbor also saw Mrs. Sanchez out in the yard on a few occasions that afternoon. (RT 106.) The Sanchez family and McGrail were never seen alive again.

About 11:00 or 11:30 p.m. that evening one of the Sanchez' neighbors to the west was awakened by the barking of his dogs. He got up, looked outside, and observed the tail-lights of a car moving west down the street. He also saw a dark colored car near the Sanchez home. (RT 107-121, 101.)

Sometime around midnight a neighbor of the Sanchez' to the east was awakened by the barking of her dog. She looked outside, did not see anything, and went back to bed. However, sometime later she heard screams coming from the Sanchez house and again looked outside to investigate. She also noted the lights were on in the Sanchez house and a big black dog she had never seen was by the house. She also saw a white car parked by the Sanchez house which she had not seen before. (RT 143-160, 175-177, 1953.)

3. <u>Leaving the Ransom and the Capture</u>

On Monday October 15, 1973, at about 9:00 a.m., Betty Ponce, the mother of Dorothy Sanchez, received a phone call. The caller

asked her if she had a daughter named Dorothy Sanchez and grandchildren named Toni and David Sanchez. The caller then indicated he was holding Dorothy and the children as hostages and she would never see them alive again unless she brought $7,000 to Seventh and Waterman. Mrs. Ponce felt it was a crank call, told the man on the line he was crazy, and he hung up. She knew Meier since he had been married to her daughter, but she did not recognize his voice on the phone. Mrs. Ponce told her husband about the call, and he went over to Mrs. Sanchez' house to see if everything was all right after learning Dorothy had not gone to work that day. (RT 369-381, 217-218.) Meanwhile Mrs. Ponce had also notified the sheriff's office before Mr. Ponce left the house and they began a preliminary investigation into the possible kidnapping of the Sanchez family. (RT 218, 254-260.)

About 9:30 a.m., Mr. Ponce arrived at the Sanchez home, found the front screen door and regular door were ajar, observed bloodstains in various portions of the house, and found broken glass in the living room. (RT 222-248.) After checking inside the house, he phoned his wife who then called the sheriff's department. (RT 248, 382.)

Lieutenant Forbush, of the San Bernardino Sheriff's Department, accordingly dispatched some deputies to the area of Seventh and Waterman, arranged for a telephone trap on the Ponce's phone, and went to the Ponce residence with two other officers. (RT 266-274.)

A little later that morning Mrs. Ponce received another call directing her to bring the money to Baseline and Waterman instead of Seventh and Waterman. She noted the man at the other end of the line sounded as if he was of Mexican descent. (RT 391-393.)

The sheriff's office brought $3,000 for Mrs. Ponce since she did not have enough money to meet the kidnapper's demands. The money was placed in a paper sack, and Mrs. Ponce drove to her bank to obtain the rest of the money needed. Lieutenant Forbush hid in the rear floor area of the car under a blanket. (RT 274-275, 285-287.) They then drove to the intersection of Baseline and Waterman. (RT 393-394.)

Around 11:30 a.m. to 12:30 p.m., Meier and Montoya were observed in the green Roadrunner belonging to Martha Evans in the vicinity of Baseline and Waterman. (RT 1059-1066, 1546-1548.)

Around noon, Mrs. Ponce's sister received a call at the Ponce house. (RT 588.) The caller asked her if she had the money and told her to come to Baseline and Waterman where there were two phone booths. Mrs. Ponce's sister told the caller Mrs. Ponce had gone to the bank and the caller said, "'Well, we'll wait there. Bye.'" (RT 600.) The sheriff's department was able to trace the call to a public phone at 1303 North Waterman. (RT 602.) The phone was in a booth near the intersection of Wabash and Waterman which is one block north of the intersection of Baseline and Waterman. (RT 632, 279-280.)

At about 12:07 p.m., Mrs. Ponce arrived at Baseline and Waterman, got out of her car, and placed the $7,000 under one of the phone booths on the northeast corner. (RT 394-398, 776-780.) After completing this task, she left the intersection and went home. (RT 781, 295-296, 398.) When she got home she received another call at 12:53 p.m. from the man who had phoned earlier and was instructed to return to Baseline and Waterman and get the money. (RT 398-401, 592, 603-604.) This call came from 306 W. Baseline. (RT 605.)

Before returning to the area, Mrs. Ponce and Forbush stopped near the office of the Department of Motor Vehicles to obtain the $7,000 from other officers. The money had been recovered after someone, uninvolved in the kidnapping plot, had removed it from the phone booth. (RT 304-305, 402-403, 424-430.)

At 1:02 p.m., Meier and Montoya were observed at a phone booth at 1303 Waterman near the intersection of Wabash and Waterman. During the next ten or eleven minutes Montoya was observed making phone calls while Meier twice walked to a position where he could look down the street at the phone booth at the intersection of Baseline and Waterman. (RT 431-432, 631-633, 736-739, 752-753, 901-910.)

Meanwhile, after Mrs. Ponce obtained the money, she returned to the phone booth at Baseline and Waterman and placed the money in the phone booth at about 1:07 p.m. She then stayed near the phone booth, and the phone rang a few moments later. When she picked up the phone, a voice instructed her to take the money to 40th and Sierra Way in San Bernardino. (RT 792-793, 404, 311-313.) In accord with these instructions, Mrs. Ponce obtained the money from the booth and she and Officer Forbush proceeded to 40th and Sierra Way. (RT 312-319, 405-407.)

During this period, Meier and Montoya left the phone booth, and drove off in the green Roadrunner automobile belonging to Martha Evans. (RT 443, 451-452, 1634.) About 1:21 p.m. the Roadrunner was seen passing the intersection of 40th and Sierra Way while Mrs. Ponce was also seen driving through the intersection. As the Roadrunner drove by, Meier and Montoya looked at the phone booths on the northeast corner of the intersection. (RT 799-807.)

About 1:33 p.m. Meier and Montoya stopped at a Mobil gas station on Waterman south of the Highway 18 freeway, and Montoya made a phone call from a booth at that location. (RT 648-649, 651-660.) At this time, Mrs. Ponce received a phone call at the booth on 40th and Sierra Way. The caller asked her if she had the money, and she said she did. The caller instructed her to put the money in a shopping basket behind the Standard Station near the Alpha Beta shopping center at Baseline and Arrowhead. (RT 859-860, 325-327, 408-411.)

Mrs. Ponce and Forbush went to the shopping center, deposited the money in a shopping cart by the gas station at about 1:48 p.m. in accord with instructions, and went back to her house. (RT 413-414, 327-338, 485-487.)

While Mrs. Ponce was placing the money in the cart, Meier had been sitting on a bench in front of the Alpha Beta store. After she left, Meier and Montoya were seen walking around the shopping center and on the streets near the intersection. (RT 488-492.) They were observed sitting together in front of the market at about 1:52 p.m. (RT 492.)

Shortly after 2:00 p.m., Meier and Montoya left the area in the Roadrunner and drove to a phone booth on Mt. Vernon north of 16th Street. (RT 665-669.) At 2:13 p.m., Montoya entered the phone booth and made a phone call. (RT 680-682, 740, 763-764.) He left the booth about three minutes later. (RT 764.)

About this time Mrs. Ponce received a call, and the voice directed her to go to the Lake Gregory area near Crestline, California. The call was traced to a phone booth on the 1600 block of Mt. Vernon. (RT 593, 606, 608.)

At about 2:30 p.m., Meier and Montoya returned to the shopping center at Arrowhead and Baseline and parked by the Standard Station near the intersection. (RT 685.)

At 2:30 p.m., appellant Walters was observed walking east behind the Standard Station near the shopping center. (RT 499-500, 833-834.) As he was walking, he kept looking around him. (RT 834.) Appellant continued walking around the area and looking around, looked at the basket with the bag of money, and did more walking and looking around the area. After appellant walked around the area a few more times and looked at the basket again, he picked up the bag of money, opened it, checked the contents, and walked over to a white Chrysler. (RT 835-840, 501-502.) After passing the rear of the vehicle, he looked all around the parking lot, briskly walked to the back of the vehicle, put the bag in the trunk, closed the trunk, and drove off. (RT 840-841.)

Moments later, Meier and Montoya were observed walking toward the Plymouth Roadrunner parked in the lot at the shopping center. (RT 844-845.) Meier was about 25 to 30 feet from the Roadrunner while Montoya was about 25 to 30 feet from the other side of the car. At this time Meier waved his hand at Montoya, both men entered the car, and drove away. (RT 846-848.) Sheriff's officers followed defendants for awhile and eventually arrested them. (RT 511-519.)

Meanwhile, other officers followed appellant Walters. While following him, they noted he was looking at a map. Walters ultimately stopped on Fifth Street between "G" and "H" Streets and was arrested shortly thereafter. Afterwards, officers opened the trunk of the Chrysler and found the bag with

the money inside. (RT 985-986, 1000-1005, 1031-1040, 1230-1233.) A map was also found inside the car, and it had a circle around the intersection of Baseline and Arrowhead. (RT 1124-1125.)

4. The Investigation of the Sanchez Home and the Roadrunner

An investigation of the Sanchez home revealed numerous bloodstains in the various rooms of the house. Officers also found some notes in the bedroom of Toni Sanchez. One of the notes began with the words, "'Grandma and Grandpa'", and ended with "'Not less than five thousand.'" Another note had a hand printed message. The first words were "'Dear'" and "'Graranda'", and the last markings were "7" and "'thoua.'" A bloodstained towel, bloodstained adhesive tape, and a bent bloodstained knife were found. An iron was also found with a missing cord. (RT 1144-1148, 1295-1301, 1318-1348, 1262-1264.)

The Roadrunner contained numerous bloodstains and vomit stains. A child's panties, rubber gloves, and scissors were found in the car. A floor mat was missing from the vehicle. (RT 1372-1382, 1386-1398, 1408-1422.)

It was ultimately determined the bloodstains on the living room floor contained the blood of John McGrail or defendant Meier. (RT 1985, 2053-2054, 2982.) The carpet padding from the left rear of the Roadrunner contained the bloodstains of appellant Walters, John McGrail, or Toni Sanchez. (RT 1995, 2055, 2982.) Carpeting and upholstery in the Roadrunner contained the bloodstains of either Dorothy Sanchez, Toni Sanchez, or John McGrail. (RT 2055-2056.)

An examination of the writing of Meier and Toni Sanchez with the notes found

at the Sanchez home revealed two of the notes had been written by Toni Sanchez and a third note had been written by Meier. (RT 1829-1846; People's No. 63.)

5. The Fate of the Victims

On October 16, 1973, at 6:30 p.m., officers went to the Lost Lake area of the San Bernardino Mountains and found the bodies of Dorothy Sanchez, Toni Sanchez, David Sanchez, and John McGrail. (RT 1713-1715.)

Dorothy Sanchez was wrapped in a blanket, and her body was tied at the knees and the neck by belts. (RT 1715-1720.) David Sanchez was found with an appliance cord wrapped around his neck twice. The cord was knotted by his throat. (RT 1724.) An officer also noted David's hands had been taped together with adhesive tape and another piece of tape was in his hair. (RT 1725.) John McGrail was found wrapped in a sleeping bag with a gaping slash wound from one side of his neck to the other side. (RT 1726.) Toni Sanchez was found nearby and there were extensive bloodstains on the ground near her body, on her body, and on her clothes. (RT 1728-1736.) A knife blade and handle and a rubber mat were also found near the bodies. (RT 1740-1741.)

A pair of scissors was found near the body of Toni Sanchez, a bloodstained bat was located 90 feet from the body of Dorothy Sanchez, and a rock with possible bloodstains was found nearby. (RT 1780-1781, 1790, 1793.) It was later determined the left front tire and rear tires of the Roadrunner may have made the tire prints found in the general vicinity of the bodies. (RT 2085-2109.)

The bodies of the victims were later examined. (RT 2207-2222.) Dorothy Sanchez

died from cerebral bruises and hemorrhage as a result of injuries to the face and head causing skull fractures. (RT 2266-2267.)

David Sanchez was strangled to death by the cord found wrapped around his neck. (RT 2279.) John McGrail died from stab wounds to the lung, an extensive incision wound in the neck, and a blow to the head. (RT 2323-2324.) The neck wound could have been caused by the kitchen knife found at the Sanchez home which had been taken from the residence of Mrs. Martha Evans. (RT 2284, 1624, 1347-1348.) Toni Sanchez died due to laceration or tearing of the brain and hemorrhage caused by skull fractures. The injuries may have been caused by a baseball bat. (RT 2340-2346.)

QUESTIONS PRESENTED

1. Whether the purported appeal pursuant to 28 U.S.C. 1257(2) should be dismissed when the California courts did not rule on the validity of Penal Code section 209 under the United States Constitution.

2. Whether the decision of the California Court of Appeal, Fourth Appellate District, Division Two should be affirmed when appellant has presented no issues raising substantial federal questions on this appeal.

A. Whether appellant was deprived of due process when he was convicted of violating Penal Code section 209 and there is ample evidence supporting his conviction.

B. Whether appellant was deprived of due process when the prosecutor failed to disclose evidence which was unrelated to the case against appellant to the Grand Jury.

C. Whether appellant was deprived of due process because the trial court did not grant his request for a change of venue when there was no reason for the trial court to grant such a request.

D. Whether appellant was deprived of due process because guards were in the courtroom when these guards were necessary for security reasons and did not impair appellant's right to confer with his counsel.

E. Whether appellant was deprived of due process when the trial court merely told the jurors they could start thinking about their opinion as to the guilt of appellant and his codefendants.

F. Whether the punishment imposed by Penal Code section 209 constitutes cruel and unusual punishment under the Eighth Amendment as applied to the states by the Fourteenth Amendment in light of the seriousness of the crime of kidnapping for ransom where the victim suffers bodily harm and the fact other states have similar or more severe penalties than the one imposed by section 209.

* * * * *

MOTION TO DISMISS

I
THE APPEAL SHOULD BE DISMISSED AS JURISDICTION DOES NOT LIE PURSUANT TO 28 U.S.C. SECTION 1257(2)

Appellant has asserted jurisdiction lies under 28 U.S.C. 1257(2); however, jurisdiction does not lie under this provision.

Pursuant to 28 U.S.C. section 1257(2) this Court has jurisdiction, by appeal, in any case where a final decision of the highest state court has sustained a state statute on federal constitutional grounds. Huffman v. Pursue, LTD. 420 U.S. 592, 605; Cohen v. California, 403 U.S. 15, 18.

Although appellant attacked California Penal Code section 209 on federal and state constitutional grounds in the California Court of Appeal, that court never considered whether the statute violated the federal constitution. Rather, it only upheld the statute under the California Constitution. (AOB Appendix pp. 24-28.)

Moreover, as the California Supreme Court summarily denied appellant's petition for hearing, there is no evidence that court considered the validity of Penal Code section 209 on federal constitutional grounds. (AOB Appendix p. 31.)

Consequently, as the California courts never considered the validity of section 209 under the United States Constitution, jurisdiction does not lie under section 1257(2). Thus, the purported appeal under that section should be dismissed.

MOTION TO AFFIRM

Assuming arguendo this Court determines the appeal should not be dismissed, it still should affirm the decision of the California Court of Appeal, Fourth Appellate District, Division Two, as appellant has raised no substantial federal question on this appeal. (See Arguments II-VII infra.)

II

APPELLANT'S CONTENTIONS AS TO SUFFICIENCY OF THE EVIDENCE FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION AS THERE IS AMPLE EVIDENCE SUPPORTING HIS CONVICTION UNDER CALIFORNIA PENAL CODE SECTION 209

Appellant initially contends his convictions for kidnapping for purposes of ransom where the victims suffered bodily harm (Penal Code section 209) are so totally devoid of evidentiary support as to constitute a violation of due process. (AOB 14.) However, his contentions as to the sufficiency of the evidence fail to raise a substantial federal question as there is ample evidence supporting his convictions under Penal Code section 209. One appealing from a state court conviction must establish his state court conviction was based on a total lack of relevant evidence to show his conviction constituted a denial of due process. Thompson v. City of Louisville, 362 U.S. 199; Adderly v. Florida, 385 U.S. 39, 44; Vachon v. New Hampshire, 414 U.S. 478.

A. There is Ample Evidence Supporting Appellant's Convictions for Kidnapping for Purposes of Ransom

The form of Penal Code section 209 in effect at the time of appellant's conduct provided

as follows:

> "Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm." (Emphasis added.)[2]

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2. On February 18, 1972, the California Supreme Court found the death penalty to be cruel or unusual pursuant to Article I, section 6 of the California Constitution. Thus, appellant could not have been punished by death in this case. People v. Anderson, 6 Cal. 3d 628.

The death penalty has recently been reenacted in California in accord with this Court's decision in Furman v. Georgia, 408 U.S. 238, and Article I, section 27 of the California Constitution which provides the death penalty shall not

In this case evidence was presented Meier and Montoya were seen in a white Chrysler on October 14, 1973. (RT 1917-1924.) On October 15, 1973, after Meier and Montoya had returned to the parking lot following their trip to the phone booth on Mt. Vernon, Walters was seen in the parking lot of the shopping center at Arrowhead and Baseline. (RT 665-669, 680-682, 740, 763-764, 685, 833-834, 499-500.)

Thereafter, Walters was seen walking around the lot and looking around. He also

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be deemed cruel or unusual punishment within the meaning of Article I, section 6 of the California Constitution. See Pen. Code, §§ 209, 190.2.

Penal Code section 209 now provides:

"Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death in cases in which any person subjected to any such act suffers death, or shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers bodily harm, or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where no such person suffers death or bodily harm."

looked at the basket containing the money and continued walking around and watching the area around him. After some further walking, he looked at the basket, picked up the bag, opened it, checked its contents, and walked to a white Chrysler. (RT 834-840, 501-502.) After passing the trunk of the white Chrysler, he looked around, briskly walked to the back of the vehicle, put the bag in the trunk, closed the trunk, and drove off. (RT 840-841.)

Moments later Meier and Montoya were seen walking toward their Roadrunner, Meier was seen signaling to Montoya, and they left the area. (RT 844-848.)

When Walters was arrested, the money was found in the white Chrysler, and a map with the intersection of Baseline and Arrowhead circled was also found in the Chrysler. (RT 1000-1005, 1031, 1040, 1230-1233, 1124-1125.)

Drawing reasonable inferences from the evidence, it is clear Walters was intimately involved in the kidnap plot. The evidence reasonably supports the conclusion the white Chrysler Walters was seen in was the exact same car Meier and Montoya had been seen in a day earlier and that Walters was thus involved with and associated with Meier and Montoya.

The conclusion that he was part of the kidnap plot is further substantiated by his furtive movements around the parking lot before finding the money. Instead of innocently walking around the lot and walking up to the bag in the cart with casual curiosity, he walked around the lot, looked all around, and stared at the basket with the bag of money.

Moreover, the fact Meier and Montoya were at the lot earlier; left the lot for awhile after the money had been dropped off by Mrs. Ponce; returned to the lot; watched Walters

remove the money, but did nothing; and Meier signaled Montoya after the money had been removed; clearly indicates Walters was part of the plot and Meier and Montoya were counting on him to perform his part of the plan.

Finally, the fact Walters had a map with a circle around the intersection where the money was picked up indicates he was going to that spot with the intent to retrieve the ransom money.

Although appellant raises some arguments to this evidence by alluding to his testimony at trial and by pointing to some other evidence in his favor, these arguments are nothing more than an attempt to have this Court reweigh the evidence. Thus, they should be rejected.

Because Penal Code section 209 proscribes kidnapping for ransom or the aiding and abetting of such conduct and there is ample evidence to support appellant's convictions under 209, his convictions do not constitute a denial of due process.

B. There is Ample Evidence to Support the Jury's Finding Appellant Was Guilty of Kidnapping for Ransom Where the Victim Suffered Bodily Harm

Appellant next suggests his convictions for kidnapping for ransom where the victims suffered bodily harm cannot stand as there is no evidence he was involved in the murder of the victims. (AOB 15.) However, Penal Code section 209 does not require each defendant inflict bodily harm on the victims in order for the allegation to apply.

Rather, the plain meaning of the statute is that when any victim suffers bodily harm during a kidnapping proscribed by section 209, all persons committing the kidnapping may be convicted of kidnapping for ransom where the victim suffers bodily harm.

Accordingly, as there is ample evidence appellant was involved in the kidnappings and that the victims were murdered during the kidnappings, the jury properly convicted appellant of kidnapping for ransom where the victims suffered bodily harm.

C. Conclusion

Therefore, as there is ample evidence to support appellant's convictions under Penal Code section 209, his contentions as to the sufficiency of the evidence do not raise a substantial federal question.

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III

A DEFENDANT HAS NO FEDERAL CONSTITUTIONAL RIGHT TO HAVE A PROSECUTOR DISCLOSE EVIDENCE FAVORABLE TO HIS DEFENSE TO A GRAND JURY

Appellant next contends the prosecutor should have disclosed exculpatory evidence to the Grand Jury. (AOB 16.) This contention is without merit.

Although the California Supreme Court has held a District Attorney aware of evidence reasonably tending to negate guilt has a duty to inform a Grand Jury of the existence of such evidence (Johnson v. Superior Court, 15 Cal. 3d 248), there is no federal case ever holding a defendant has a federal constitutional right to have a prosecutor disclose evidence favorable to a defense to a Grand Jury.

United States v. Ash, 413 U.S. 300, relied on by appellant does nothing to support his contention here. That case merely holds there is no right to counsel at a photographic lineup. Id. at 321. Even assuming there is some federal constitutional right to have the prosecutor disclose exculpatory evidence to the Grand Jury, appellant's contention here still would fail.

Although he contends the prosecutor should have disclosed evidence as to another man who picked up the ransom money earlier in the day, the other man who picked up the money had nothing to do with the case against appellant. He merely happened to walk by the phone booth and took the money apparently believing someone had lost it or accidentally left it there. There was absolutely no indication he had anything

to do with the kidnapping plot. Accordingly, the prosecutor had no duty to present this evidence to the Grand Jury. (See also AOB Exh. B, pp. 9-10.)

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IV

APPELLANT WAS NOT DEPRIVED OF DUE PROCESS BECAUSE THE TRIAL COURT DID NOT GRANT HIS REQUEST FOR A CHANGE OF VENUE

Appellant next contends he was deprived of due process because the trial court did not grant his request for a change of venue. (AOB 17.) See Sheppard v. Maxwell, 384 U.S. 333. However, this contention is also meritless.

Initially, it must be pointed out that the newspaper articles appellant complains about were not the type which prejudiced the community against him so that he could not have selected a fair jury.[3]

Although there were many articles about the case, nearly all of the articles were published during the period from October 16, 1973, until October 23, 1973, and related primarily to the search for the Sanchez family and McGrail, the location of their bodies, the arrest of Meier, Montoya, and Walters, and the burial of the victims. Thereafter, with the exception of an interview with Meier's mother and an article about Montoya slashing his wrist, the articles only reported the proceedings directly relating to the case, and did so in a concise and factual manner.

None of the articles expressed the views of the newspapers as to the guilt of Walters, nor did they consist of editorial comments which could have inflamed the passions

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3. Appellee has reviewed the newspaper articles about this case which were considered by the court below and are on file in the San Bernardino County Clerk's Office.

and prejudices of the residents of San Bernardino County against appellant. See Murphy v. Florida, 421 U.S. 794, 802. Compare Sheppard v. Maxwell, supra at 339-342, 345-349.

In the Sheppard case, for example, there were numerous articles with banner headlines such as "'Why Don't Police Quiz Top Suspect'", or "'Kerr (Captain of the Cleveland Police) Urges Sheppard's Arrest.'" Id. at 340-341.

Furthermore, unlike newspaper articles in California cases such as Maine v. Superior Court, 68 Cal. 2d 375, 386 and People v. Tidwell, 3 Cal. 3d 62, 70, there were no advance reports in the newspapers any of the defendants had confessed to the crimes. See also Murphy v. Florida, supra at 799.

Moreover, there was no evidence either the prosecutor or defense counsel repeatedly spoke to local newspapers about the case and were quoted by the papers regarding their views on the case. Compare Maine v. Superior Court, supra at 386.

In addition, it should be noted jury selection in the case did not begin until January 23, 1974 (VT 1)[4] and nearly all the articles about the case had appeared three months earlier during the period from October 16, 1973, to October 23, 1973. Thus, it was likely many persons in the county had forgotten about the case by the time the jury was selected and that any passions which may have been inflamed by the articles would have cooled. See Murphy v. Florida, supra at 802.

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4. VT refers to the Reporter's Transcript of the voir dire proceedings in this case.

Thus, while there was extensive coverage of the crime and some of the subsequent proceedings, the coverage was not so unusually widespread, inflammatory, sensational, or continuing, to the extent Walters could not have received a fair trial in San Bernardino County. See Murphy v. Florida, supra. (See also AOB Exh. B, pp. 10-11.)

Moreover, the record in this case shows Walters selected a jury that had not been inflamed by the media, but could give him a fair trial. The jurors who actually rendered the verdicts in this case were Verna Swift, Corrine Lemke, Jimmie Enciso, Nadine Bengel, J. S. Chappell, Marie Uray, Harold Lemaster, Gilbert Granados, Betty Miller, Evelyn Vanalstine, Ida Williams, and Natalie Olsen.[5]

Verna Swift testified she had read headlines about the case in the newspapers, but did not follow the articles or pursue the matter any further. She also stated she did not feel she had acquired any preconceived notion about the case which could affect her judgment. (VT 57, 216.) In addition, she stated she did not know the locations or witnesses involved in the case. (VT 143-145.)

Corrine Lemke was a member of the first panel of potential jurors in the case. When members of the panel were asked to indicate if they read anything about the case, she did not

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5. Melva Gundlach and Sharon McCullough were originally selected for the jury, but had been excused for personal reasons before the jury rendered the verdicts. (CT 92, 196-201, 224; VT 1291-1354.)

indicate she had read anything about the case. (VT 24, 53-64, 83-84, 100-102, 114-132.) In addition, she testified she would decide the case solely on the evidence she heard in the courtroom. (VT 146-147, 224-226.)

Jimmie Enciso was a member of the second group of potential jurors in the case. He also did not indicate he had read anything about the case. He further testified he did not know the locations or witnesses in the case and would render his decision based on the evidence. (VT 364, 382-385, 425-436, 559, 562, 565.)

Marie Uray stated she had not read anything about the case, and did not know any of the witnesses or places involved in the case. (VT 508.)

Harold Lemaster was also a member of the second group of potential jurors and never indicated he had read anything about the case. (VT 365, 382-385, 425-436.) He also testified he had no knowledge of the names or places involved in the case, and there was no reason why he could not be fair and impartial. (VT 660, 669-670.)

Nadine Bengel testified she only read the crimes had occurred and did not read the names of the parties to the crime or about the facts in the case. (VT 719.) She further testified she could be completely impartial. (VT 719.)

Mr. Chappell was a member of the third panel of potential jurors and did not indicate to the court he had read anything about the case. (VT 672-673, 695-705, 711-742.) In addition, he testified he could be completely fair and impartial to everyone involved in the case. (VT 871.)

Betty Miller testified she had not read or heard anything about the case. (VT 672-674, 695-705, 711-742, 936-937.)

Natalie Olsen was a member of the third panel of potential jurors and did not indicate she had read anything about the case. (VT 672, 675, 695-705, 711-742.) She also told the court the names and places in the case were not familiar to her. (VT 963-964.)

Ida Williams testified she had only read about the deaths of the victims and stated she could still give appellant a fair trial. (VT 996-997.) She further stated she would not judge appellant by what she had read in the paper, but only on the evidence in the case and the applicable law. (VT 997, 1013.)

Evelyn Vanalstine was a member of the second supplemental panel used for selection of alternates. (VT 1101-1103.) She did not indicate she had read or heard anything about the case. (VT 1121-1128.) Moreover, she stated the names and places involved in the case were unfamiliar to her and she could be fair and impartial. (VT 1204-1205.)

Gilbert Granados likewise was a member of the second supplemental panel used for selection of alternates. (VT 1101-1103.) He also did not indicate he had read anything about the case. (VT 1121-1128.) Moreover, he informed the court he could be fair to all persons involved in the case. (VT 1219.)

From the record it is thus evident only three of the twelve jurors read anything about the case, and those three jurors did not do any extensive reading about the matter. Also, there was nothing to indicate any of the jurors could not impartially and fairly consider appellant's guilt or innocence. The fact the jury fairly

decided the case is also evidenced by the fact Walters was acquitted of the four counts of murder he was charged with.

Thus, it is clear the jury finally selected was eminently fair and was not prejudiced because of any news coverage of the case. See Murphy v. Florida, supra at 800-801.

In addition, the fact there were articles in the paper around October 23, 1973, concerning the burial of the victims and donations in honor of the victims does not mean appellants could not have obtained a fair trial in the county.

In Maine v. Superior Court, supra at 385, there was evidence a substantial amount of money was raised to aid the victims of a crime in a county with a population of 51,000. While the California Supreme Court considered this to be a factor in determining whether venue should be changed, the court also stated that not all sympathy for victims of crimes is necessarily evidence of antipathy to the perpetrators of the crime. Instead, the court noted that in that case venue should have been changed because of community bias in light of the extensive amount of charitable aid by the small population of the county.

By contrast in the case at bar, although there were about 3200 people at the funeral and some donations were made; this does not show the entire county was prejudiced against appellants since San Bernardino County has a population of 684,072. Calif. Gov. Code § 28020. Accordingly, the fact some sympathy was expressed for the victims does not mean appellant could not have obtained a fair trial in the county.

In addition, other factors in this case support the decision of the court below in not changing venue. First, while the victims

may have had friends in the county, there was no showing below they were either prominent or popular citizens in the community who were known by a majority of the population in the county. Compare Maine v. Superior Court, supra at 385; Fain v. Superior Court, 2 Cal. 3d 46, 49; People v. Tidwell, supra at 73 (popular teenagers murdered).

Furthermore, appellant's crimes took place in a large metropolitan area rather than a small rural community. San Bernardino County has a population of over 684,000 and is ranked 7th out of the 58 counties in California in population. Gov. Code § 28020. In addition, the west end of the county is closely related and connected to the urban population of Riverside County and Los Angeles County. Thus, it was highly unlikely the average person in the county would be prejudiced or biased because they personally knew the victims or appellant or because of personal knowledge of the case. See People v. Hathcock, 8 Cal. 3d 599, 620. Compare People v. Tidwell, supra at 70, 74-75; Maine v. Superior Court, supra at 385-386 (small populations where population knew victims and were intimately aware of and involved in the case).

Finally, it is clear from the record Walters did in fact receive a trial free from undue publicity. A protective order was issued by the court before trial (CT 43-46), and there was no evidence anywhere in the record that there were distractions during the trial by the presence of communications media in the courtroom. Compare Sheppard v. Maxwell, supra; Estes v. Texas, 381 U.S. 532. See Murphy v. Florida, supra at 798.

Therefore, it is clear from the facts and law set forth above that Walters did in fact receive a fair trial in this case. Accordingly, his contentions here regarding a change of venue are without merit and must fail.

V

THERE IS NO EVIDENCE IN THE RECORD APPELLANT WAS PRECLUDED FROM CONSULTING WITH HIS COUNSEL DURING THE TRIAL

Appellant next contends he was deprived of due process because armed guards by the counsel table prevented him from conferring with his counsel during the trial. (AOB 20.)

At the outset it should be noted there was nothing improper about having guards in the courtroom in light of the fact appellant and his two codefendants were charged with four murders and four kidnappings for ransom. Obviously, the three men together posed a substantial security threat to others in the courtroom and in the courthouse.

Moreover, although a defendant clearly has a constitutional right to consult with his counsel during a trial (see Geders v. United States, ___ U.S. ___, 44 U.S.L.W. 4420, March 30, 1976), there is nothing in the record to indicate appellant and his attorney could not consult or that they could not consult with each other to the extent appellant could not receive a fair trial. In addition, no confidential communications between appellant and his attorney were overheard by any guards, nor were any of his statements to his counsel used against him.

It should be noted the record indicates the guards were standing in reasonable proximity to appellant only because of the physical layout of the courtroom rather than because of any contrived plan to intercept any communications. (See VT 12-14; RT 494-496.)

Finally, the lack of merit of appellant's contention is substantiated by the fact

his attorney never objected on this ground below. Instead, the objections on this ground were made by the attorney for one of the codefendants. (RT 494-496; VT 12-14; CT 66.)

* * * * *

VI

APPELLANT WAS NOT DEPRIVED OF DUE PROCESS MERELY BECAUSE THE TRIAL COURT TOLD THE JURORS THEY COULD START THINKING ABOUT THEIR OPINION AS TO THE GUILT OF APPELLANT AND HIS CODEFENDANTS

Appellant also contends the trial court improperly told the jury they could start forming their opinion about the case before hearing defense counsel's argument. He suggests this statement was, in effect, a direction to the jury that appellant and the codefendants were guilty and that nothing defense counsel could say could possibly make a difference. (AOB 20.)

California Penal Code section 1122 provides:

> "The jury must also, at each adjournment of the court before the submission of the cause to the jury, whether permitted to separate or kept in charge by officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them."

At the close of the prosecution's opening argument in this case the court admonished the jury as follows:

> "THE COURT: We will take our afternoon recess at this time.
>
> "Of course, as I have told you before, the admonition becomes increasingly important each time, each day we go along.

"While you have heard all the evidence, there is still the summation by the defendants and there is still the final argument by the People, and then the instructions by the Court, so while you can be thinking about your opinion certainly you shouldn't voice it to anyone and, of course, you should not discuss it with anyone; don't even mention it and don't let anybody talk to you at all about this case.

"Refrain from reading the newspaper, listening to the television or the radio, or anything that in any way would be similar or that in any way would erase from your mind the evidence you have heard in this court, or confuse the evidence you have heard in this court.

"While I say that you can start forming an opinion,you are not to express this to anyone. Don't even discuss it among yourselves.

"You are not to talk about this case with even your fellow jurors until it is finally submitted to you for your final determination, and you will then deliberate.

"Until that time, remember not to discuss it with anyone.

"We will be in recess until 9:30 tomorrow morning.

"THE BALIFF: This Court will be in recess until 9:30 tomorrow morning." (RT 3122-3123.)

While the court's admonishment to the jury was not in the exact language of section 1122, there still was no constitutional error. The court told each juror, as it had many previous times during the trial, not to discuss his opinion with any other members of the jury since they had not, as yet, heard closing argument by the defense. Thereafter, the court told the jury they could start forming an opinion about the case, but should not express it to anyone.

By this statement the court did not intend to tell the jury to reach conclusions about the case before it had heard closing argument by the defense. Rather, it merely informed the jurors they could start thinking about their conclusions in the case.

Certainly, this admonishment could not amount to constitutional error since each juror presumably had started sorting out the evidence and thinking about the ultimate verdicts he would render in the case after having heard all the evidence in the lengthy trial. The court's admonishment did not tell jurors to disregard the closing defense arguments, but realistically assumed the jurors had started sorting out the evidence and thinking about their verdicts, and informed them to be careful not to express their own ideas on the case to others while thinking about their ultimate opinion of the case.

Contrary to appellant's suggestions, this admonishment could not be construed as informing the jurors they should reach conclusions about appellant's guilt before hearing closing defense arguments. Moreover, the jurors in this case were certainly not so stupid or ill-advised that they would have interpreted the admonition in this matter. As has been observed about jurors in another vein:

> " . . . many attorneys tend to underestimate the stability of a jury. A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box." People v. Long, 38 Cal. App. 3d 680, 689. (See also AOB Exh. B, p. 18.)

Even assuming arguendo this Court feels the admonition by the court amounted to error, a reversal still is not required since appellant suffered no prejudice.

In the instant case there has been no showing the incorrect admonishment in any manner affected the verdicts rendered by the jury. Indeed, it would be impossible to show any prejudice resulted since the court on later occasions admonished the jury to not form or express an opinion about the case. (RT 3196, 3227-3228, 3351.)

* * * * *

VII

THE PUNISHMENT IMPOSED BY PENAL CODE SECTION 209 DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

California Penal Code section 209 imposes the punishment of life imprisonment without the possibility of parole upon a person convicted of kidnapping for ransom where the victim suffers bodily harm. Appellant is now facing a term of life without possibility of parole pursuant to section 209 and contends the punishment imposed by the statute constitutes cruel and unusual punishment within the meaning of the Eighth Amendment as applied to the states by the Fourteenth Amendment. (AOB 21.)

In determining whether a sentence constitutes cruel and unusual punishment courts consider whether the sentence imposed shocks the conscience, is disproportionate to the offense, or offends evolving notions of decency. See Trop v. Dulles, 356 U.S. 86, 101; Newman v. State of Alabama, 503 F.2d 1320, 1330 fn. 4 (5th Cir. 1974). Applying these standards here, it is clear the punishment imposed by section 209 is not cruel and unusual.

Initially, it is evident the punishment imposed is not disproportionate to the gravity of the crime and this is not cruel.

The crime of kidnapping for purposes of ransom where the victim suffers bodily harm is, no doubt, one of the most serious and heinous of all crimes. Kidnapping for ransom involves the capture, and forcible confinement of a person against his will. It is always an act of premeditation and deliberation which is carried out solely to satisfy the greed of the perpetrator. Where bodily harm is also involved the crime is also brutal in nature and often even sadistic.

Indeed, kidnapping for ransom where the victim suffers bodily harm is conceivably more heinous than many homicides which may accidentally be carried out in the heat of passion, in a mistaken belief they were justified, or because of some irrational and bizarre beliefs by the perpetrator.

Furthermore, kidnapping not only places the victim in danger as does a murder, but it also involves anguish and stress upon the family of the victim and places them, law enforcement officers, and innocent bystanders in danger when they are required to deliver a ransom to a spot designated by the kidnappers and/or may make attempts to rescue the victims from the clutches of the kidnapper or kidnappers.

Thus, it is clear kidnapping for ransom where the victim also suffers bodily harm is perhaps the most serious offense proscribed by the California Penal Code. Accordingly, life without possibility of parole is certainly appropriate in this case where the kidnapping was carried out for purposes of ransom and the victims did suffer bodily harm, in this case, death. See In re Maston, 33 Cal. App. 3d 559.

Moreover, it cannot be said the punishment is contrary to common notions of decency and thus unusual. Arizona, Nevada, and West Virginia also impose a punishment of life without parole. (AOB Exh. L pp. 48-56.) Furthermore, the punishment cannot be deemed unusual to the extent it is much more severe than the punishment imposed by other states. Many states impose the death penalty for kidnapping under the circumstances present here. Thus, the punishment imposed here is not unusual.

Accordingly, the punishment imposed by Penal Code section 209 does not constitute cruel and unusual punishment within the meaning of the Eighth Amendment as applied to the states by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, we respectfully request the appeal be dismissed or affirmed.

Respectfully submitted,

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